



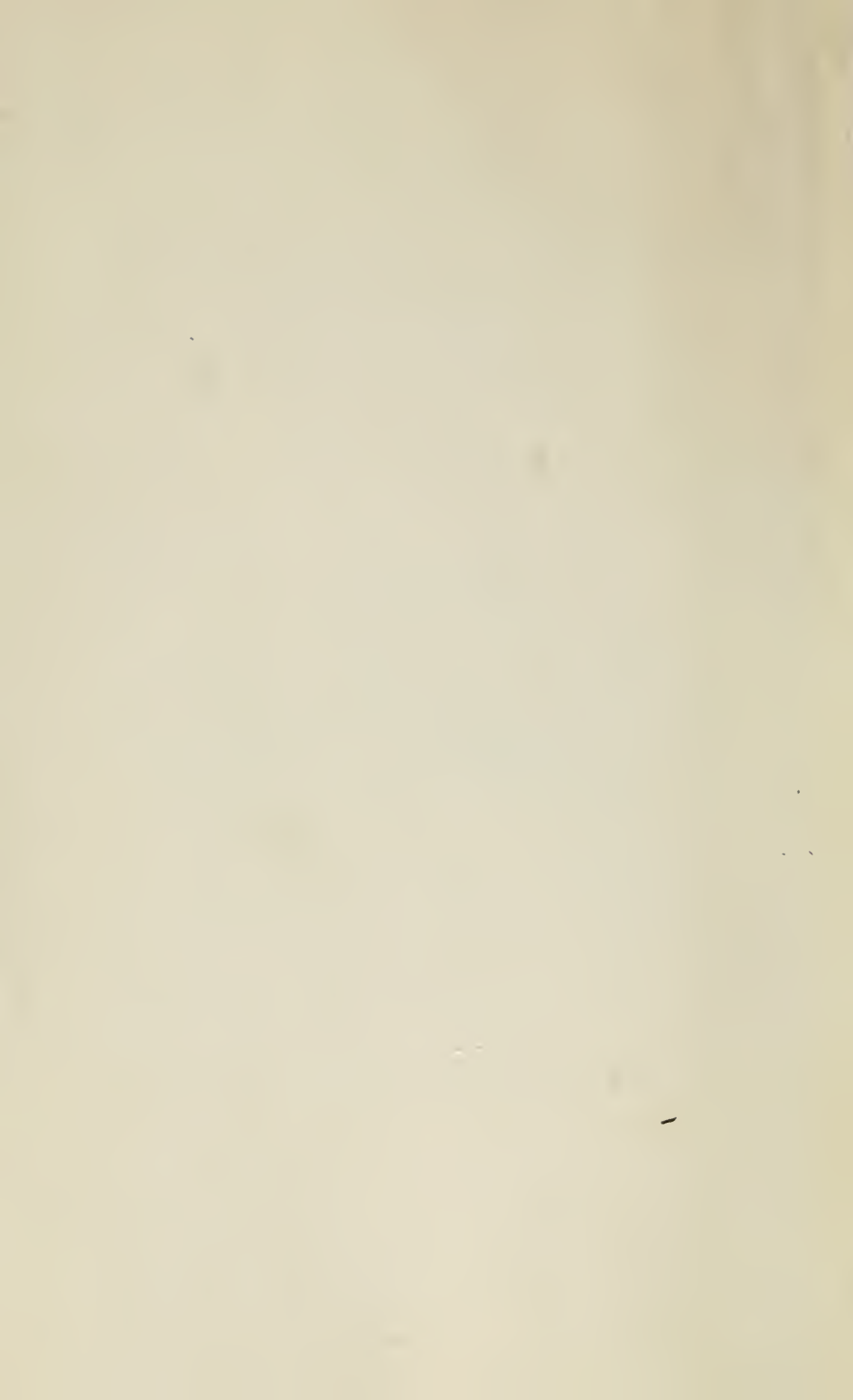
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United States
Circuit Court of Appeals

For the Ninth Circuit.

Vol

2302.

GILA VALLEY IRRIGATION DISTRICT,
FRANKLIN IRRIGATION DISTRICT,
ROY A. LAYTON, MILTON LINES, WIL-
LIAM WALDROM, ROY D. WILLIAMS,
and J. D. WILKINS,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record
In Two Volumes

VOLUME I

Vol 2 missing

Upon Appeal from the District Court of the United
States for the District of Arizona.

JUN 14 1940

PAUL P. O'BRIEN,

United States
Circuit Court of Appeals

For the Ninth Circuit.

GILA VALLEY IRRIGATION DISTRICT,
FRANKLIN IRRIGATION DISTRICT,
ROY A. LAYTON, MILTON LINES, WIL-
LIAM WALDROM, ROY D. WILLIAMS,
and J. D. WILKINS,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States
for the District of Arizona

Globe Equity No. 59

THE UNITED STATES OF AMERICA,

vs.

GILA VALLEY IRRIGATION DISTRICT, et al.

PETITION TO REVIEW ACTION OF
WATER COMMISSIONER

Come now Gila Valley Irrigation District, an irrigation district organized and existing under the laws of the State of Arizona and embracing lands in Graham County, Arizona, Franklin Irrigation District, an irrigation district organized and existing under the laws of the State of Arizona and embracing lands in Greenlee County, Arizona, Roy A. Layton, Milton Lines and William Waldrom, as directors of said Gila Valley Irrigation District, and individually, as land owners in said Gila Valley Irrigation District, Roy D. Williams and J. D. Wilkins, as officers of Franklin Irrigation District, and individually, as land owners within said Franklin Irrigation District, (all being defendants named in the Decree entered herein on the 29th day of June, 1935), and, being aggrieved by the actions and orders of the Water Commissioner hereinafter named, in their own behalf and in behalf of all other owners of lands within said Districts and using waters from the Gila River under the pro-

visions of said decree, respectfully show the Court as follows:

I.

That heretofore, on or about the 12th day of November, 1935, this Court appointed Charles A. Firth as Water Commissioner, pursuant to the provisions contained in said decree, and the said Charles A. Firth ever since has been, and now is, the duly qualified and acting Water Commissioner under said decree. [205]

II.

That these petitioners, and all persons for whom this petition is filed as hereinbefore set forth, are aggrieved by the actions and orders of said Water Commissioner, in the following particulars:

That said decree, in Article VIII, Subsec. (2), provides in part:

“(2) That on the first day of January of each Calendar year, or as soon thereafter as there is water stored in the San Carlos Reservoir, which is available for release through the gates of the Coolidge Dam for conveyance down the channel of the Gila River and for diversion and use on the lands of the San Carlos Project for the irrigation thereof, then the Water Commissioner, provided for herein, shall, to the extent and within the limitations hereinafter stated, apportion for the ensuing irrigation year to said defendants from the natural flow of the Gila River an amount of water equal to the

above described available storage, and shall permit the diversion of said amount of water from said stream into the canals of said defendants for the irrigation of said upper valleys lands in disregard of the aforesaid prior rights of plaintiff used on lands below said reservoir; the diversion of said amount of water by said defendants to be in accord with the priorities as between themselves stated in said Priority Schedule and for the irrigation of the lands covered by the rights accredited to said defendants in said Priority Schedule and the quantity of water permitted to be taken by said defendants in disregard of prior rights of the United States below is in addition to and not exclusive of the rights of said defendants to take from the stream in the regular order of their priorities as shown by the Priority Schedule, but of course within the duty of the water limitations of this decree; that if and when at any time or from time to time in any year, water shall flow into said reservoir after said date of first apportionment and shall be stored there and become added to the available stored water in said reservoir, the said commissioner shall make further and additional apportionments to said defendants of the natural flow of said stream as the same is available at the diversion points of said defendants, which said apportionments shall in turn correspond with and be equivalent in quantity to the amount of such accessions or

newly available stored water supply; that in calculating apportionments of the stored water supply the Water Commissioner shall make appropriate deductions for losses for evaporation, seepage or otherwise that may be suffered between the time of the apportionment and that of the diversion of a corresponding quantity of water from the stream; that such apportionments, corresponding with net accessions during each annual period after first apportionment, shall be made by said Water Commissioner at least as frequently as once per calendar month (provided accessions to stored supply have occurred during that period) and at such more frequent intervals as the conditions in his judgment may demand——”.

That said decree is a consent decree, and, as an in- [206] ducement and consideration for entering into the same and consenting thereto, it was intended and agreed by the parties thereto that said decree should provide, and it does provide, that apportionments of the water which said Upper Valley Users should be entitled to divert from said River and use upon their said lands should be made as follows:

That, beginning on the first day of January of each year, said Commissioner should make an apportionment of water to said Upper Valley Users equal to all water then stored in said San Carlos Reservoir and available for release through the

gates of said Reservoir for use by the Lower Valley Users, less deduction for estimated evaporation; that thereafter, and upon making each additional apportionment to said Upper Valley Users during the period of said year, the said Commissioner should take into account and apportion an additional amount of water equal to all water flowing into said Reservoir since the date of the last apportionment, less an estimated allowance for seepage and evaporation and less the amount of water which, by the terms of said decree, must be delivered to Kennecott Copper Corporation, Joseph J. Anderson, Grady L. Herring and T. H. B. Glasspie.

III.

That the said Water Commissioner has, at all times since his appointment, failed and refused to apportion to petitioners and to the other land owners using waters from the Gila River, and represented by petitioners as aforesaid, the waters to which they were and are entitled under and by virtue of the provisions of said decree, but, on the contrary, has apportioned and permitted the diversion and use by petitioners and said land owners of only the amount of water determined by said Water Commissioner as follows:

That, on January first of each year, said Water Commissioner determines the amount of water then stored in the [207] San Carlos Reservoir, and which is available for release through the gates of the Coolidge Dam as of that date, and, after allowing

for estimated evaporation, apportions to the Upper Valley Users named in said decree, which includes these petitioners and said land owners, an amount of water equivalent to said stored water then in said San Carlos Reservoir less said allowance for evaporation; that thereafter, and from time to time during each year after January first, in making subsequent apportionments said Water Commissioner takes into account and makes apportionments to said Upper Valley Users of only such additional waters as have flowed into said Reservoir and have remained therein and which raise the elevations of water within said Reservoir since the date of last apportionment; and that said Water Commissioner fails and refuses to take into account all of the water which has flowed into said Reservoir since the date of his last apportionment less the water which, by the terms of said decree, must be delivered to the defendants, Kennecott Copper Corporation, Joseph J. Anderson, Grady L. Herring and T. H. B. Glasspie, and less estimated seepage and evaporation.

IV.

That these petitioners are informed and believe, and therefore allege, that, had the said Water Commissioner apportioned to the Upper Valley Users the amount of waters which they are entitled to receive under and by virtue of the terms of said decree, as hereinbefore alleged, and within the limits of said decree, the said Upper Valley Users, including these petitioners, would have received appor-

tionments for, and have been entitled to divert and use from the Gila River, approximately one acre-foot per year for each acre of land owned by them and described in said decree, in addition to the apportionments which were in fact made to them and in addition to the amounts of water actually diverted from the Gila River and used by them on said lands. [208]

V.

That this petition is filed pursuant to the provisions of Article XII of said decree.

Wherefore, these petitioners, in their own behalf and in behalf of all other owners of lands using water from the Gila River within said Irrigation Districts, respectfully pray the Court, that it will review the actions and orders of said Water Commissioner hereinbefore complained of, and that it will order said Water Commissioner to make apportionments of water to these petitioners and to the users of water within said Districts, as provided in said decree and set forth in this petition.

RALPH W. BILBY

T. K. SHOENHAIR

CLEON T. KNAPP

JAS. P. BOYLE

B. G. THOMPSON

Attorneys for Petitioner.

State of Arizona,
County of Pima—ss.

Roy A. Layton, being first duly sworn, deposes and says: That he is one of the petitioners named in the foregoing petition; that he has read said petition and knows the contents thereof, and that each and all of the allegations contained in said petition are true, in substance and in fact, save and except those matters therein alleged upon information and belief, and, as to those matters, he believes them to be true; that affiant makes this verification in his own behalf and in behalf of all the other petitioners named in said petition.

ROY A. LAYTON

Subscribed and sworn to before me this 1st day of July, 1939.

[Notarial Seal]

J. G. LITTLEFIELD

Notary Public.

My commission expires:

January 14, 1942. [209]

[Endorsed]: Service of a Copy of the within petition upon me is hereby acknowledged this 1st day of July, 1939. C. A. Firth, Water Commissioner.

[Endorsed]: Filed Jul. 5, 1939. [210]

[Title of District Court and Cause.]

ANSWER OF PLAINTIFF TO PETITION TO
REVIEW ACTION OF WATER COMMISSIONER.

Comes now the United States of America, plaintiff in the above entitled action, and, without waiving its motion heretofore filed asking that the petition to review action of Water Commission be made more definite and certain, answering the petition heretofore filed to review the action of Water Commissioner, Charles A. Firth, denies and alleges as follows:

I.

Denies the allegations contained in paragraph I of said petition, except that it is admitted that Charles A. Firth was appointed Water Commissioner on or about November 12, 1935, and that he has been the qualified and acting Water Commissioner since January 1, 1936, and that he now is such commissioner.

II.

Denies all of the allegations contained in paragraph II, except that it is admitted that the decree therein referred to contains the provisions as set out in said paragraph.

III.

Denies the allegations contained in paragraph III, and alleges, on information and belief, that the Water Com- [211] missioner has, at all times since his appointment, apportioned and diverted

waters of the Gila River to these petitioners in accordance with the provisions of said decree.

IV.

As to the allegations of paragraph IV, on information and belief, plaintiff denies that the upper-valley water users have not received, and are not now receiving, the water they were, or are, entitled to under the terms of said decree but, on the contrary, they have heretofore received all the water of the Gila River to which they are, or at any time since the entering of said decree have been, entitled under the terms thereof.

Wherefore, plaintiff prays for an order denying said petition to review action of Water Commissioner and dismissing the same.

F. E. FLYNN

United States Attorney.

State and District of Arizona,
County of Maricopa—ss.

F. E. Flynn, being first duly sworn, deposes and says, that he is the duly appointed, qualified and acting United States Attorney for the District of Arizona, and as such is attorney for plaintiff herein; that he has read the petition to review action of Water Commissioner filed herein, and knows the contents thereof; that the matters and things alleged in said petition which are denied in the foregoing answer are untrue in substance and in fact of his own knowledge, except as to the matters and

things which are therein denied upon information and belief, and as to such matters he believes it to be untrue; that the matters and things alleged in said answer are true in substance and in fact of his own knowledge, except as to those matters and things therein alleged upon information and belief and, as to such matters and things, he believes it to be true.

F. E. FLYNN

Subscribed and sworn to before me this 9 day of September, 1939.

[Seal]

JEAN E. MICHAEL

Deputy Clerk, United States District Court. [212]

[Endorsed]: Receipt Is Acknowledged of a copy of the within answer this 9th day of September, 1939. Bilby & Shoenhair, Knapp, Boyle & Thompson, Attorney for Petitioners.

[Endorsed]: Filed Sep. 9, 1939. [213]

[Title of District Court and Cause.]

ANSWER OF WATER COMMISSIONER TO
PETITION TO REVIEW HIS ACTIONS
AND ORDERS.

Comes now, Charles A. Firth, the duly appointed, qualified and acting Water Commissioner herein, and without waiving his motions heretofore filed herein but specifically reserving, relying and insisting upon the same, for answer to the Petition here-

tofore filed to review his actions and orders as such Water Commissioner, says,—

I.

Denies that Petitioners, or any of them, or any party named in the decree as entered in this cause, have been or are aggrieved by the actions and orders, or either, or at all, of the Water Commissioner as alleged in lines 21 and 22 of the opening statement of their Petition, or at all, but on the contrary your Water Commissioner alleges that the Petitioners, or either or any of them, have no just cause for complaint for the actions and orders, or either of them, or at all, of said Water Commissioner.

II.

Admits that part of paragraph I wherein it is alleged that on or about November 12, 1935 Charles A. Firth was appointed Water Commissioner pursuant to the provisions contained in said decree, but denies that since said date he has been the Water Commissioner, but alleges that he has been the qualified and acting Water Commissioner since January 1st 1936, and has been since said latter date and now is such Water Commissioner. [214]

III.

Denies that part of paragraph II in lines 3 and 4 on page 2, wherein it states that these Petitioners are aggrieved by the actions and orders of said Water Commissioner, but on the contrary alleges that the Petitioners, or any of them, have no just

cause for complaint on account of the actions and orders, or either, or at all, of said Water Commissioner; Admits that said decree, in Article VIII, subsec. (2), provides in part the language as set forth in lines 8 to 31 inclusive on page 2; Alleges he is without knowledge or information sufficient to form a belief as to the truth of the averment "That said decree is a consent decree", as set forth in line 32 on page 2.

Without waiving his motion to Strike heretofore filed herein, but specifically reserving, relying and insisting upon the same your Water Commissioner alleges he is without knowledge or information sufficient to form a belief as to the truth of the averment as set forth beginning in line 32 on page 2 and ending in line 3 on page 3 of paragraph II reading as follows,—

“and, as an inducement and consideration for entering into the same and consenting thereto, it was intended and agreed by the parties thereto that said decree should provide,”

and therefore denies the same; Admits that it does provide what is set forth in said decree; Denies that apportionments of the water which said upper valley users should be entitled to divert from said River and use upon their said lands should be made as set forth in lines 7 to 20 inclusive on page 3.

IV.

Denies that part of paragraph III on page 3 of the petition beginning with line 22 and ending with

the word "decree" in line 27; States that the alleged manner in which said Commissioner makes apportionments as set forth beginning with the word "but" in line 27 on page 3 to the end of paragraph 3 on page 4 of said petition, is vague, indefinite and ambiguous and [215] therefore the allegations therein set forth are denied, but alleges that the said decree provides, and your Water Commissioner has heretofore made, and is now making, apportionments of the stored waters of the San Carlos Reservoir to Petitioners in the following manner, to-wit,—

First Apportionment.

Section 2 of article VIII on page 106 of the decree provides in part as follows:

"That on the first day of January of each Calendar year, or as soon thereafter as there is water stored in the San Carlos Reservoir, which is available for release through the gates of the Coolidge dam for conveyance down the channel of the Gila River and for diversion and use on the lands of the San Carlos project for the irrigation thereof, then the Water Commissioner, provided for herein, shall, to the extent and within the limitations hereinafter stated, apportion for the ensuing irrigation year to said defendants from the natural flow of the Gila River an amount of water equal to the above described available storage" * * * *

In order to determine the amount of available stored water a capacity curve for the reservoir was prepared showing the amount of water in storage for each elevation of the water surface. Such a curve is computed by making a contour map of the reservoir basin and from this map the areas at different elevations can be measured and the amount of water stored in the reservoir for any given water surface elevation can be determined.

In order to facilitate the obtaining of these water surface elevations, and to increase the accuracy of such measurements, and to have a permanent record of such elevations, a water stage recorder has been installed on the dam which keeps a continuous graph of the lake surface elevations at all times.

In order to determine the amount of water in storage on January 1st of each year, it is only necessary to take the elevation of the water surface as shown on the recording graph for that day and from the capacity curve the amount of the available stored water can be computed. From this amount an appropriate deduction is made for losses for evaporation, seepage or otherwise as provided for in this article. As the evaporation losses are dependent upon climatic conditions, the area of the lake's surface being exposed to these conditions, and the time required to divert a corresponding quantity of water from the stream, the future losses that will take place cannot be accurately determined; so, therefore, an estimate is made based on the known conditions and past records for the

evaporation losses which amount is deducted from the available water supply. Later as these variable conditions become known and the losses can be more accurately computed, corrections are made to the original estimated losses and the apportionment is increased or decreased accordingly. No deduction for seepage loss is made from the first apportionment for the reason that such losses generally [216] occur when the water surface of the lake is ascending and additional lake bed area is being covered with water, and as the first apportionment is based on a static condition, it is not possible to estimate that any losses will occur.

In making the first apportionment the elevation of the water surface and the corresponding amount of available stored water is shown, and from this amount the estimated evaporation losses that will occur is deducted.

Additional Apportionment.

Section 2 of the same article further provides in part:

“that if and when at any time or from time to time in any year, water shall flow into said reservoir after said date of first apportionment and shall be stored there and become added to the available stored water in said reservoir, the said commissioner shall make further and additional apportionments to said defendants of the natural flow of said stream as the same is available at the diversion points of said defendants,

which said apportionments shall in turn correspond with and be equivalent in quantity to the amount of such accessions or newly available stored water supply'' * * *

In order to determine when the water flowing into the reservoir is being stored it must be known when there has been an increase in the amount of available stored water. There cannot be an increase in the amount of stored water in the reservoir without there being a corresponding rise in the water surface elevation, and it is possible by means of water stage recorder to determine when such increases occur and the amount thereof. The graphs removed from the water stage recorder on the San Carlos reservoir are tabulated and whenever a MINIMUM elevation is reached the time and elevation is noted. As the water is being stored the water surface rises until a maximum elevation is reached and the time and elevation is again noted. By means of these two elevations and the use of the capacity curve the volume of water stored during that period of time can be determined. A record is kept of all such increments of gain.

From the amount of newly available stored water deductions are made for estimated additional evaporation losses which were not included in the first apportionment. These evaporation losses are later computed and proper corrections are made to the amount previously apportioned.

As to seepage losses; when the water surface of the lake is rising and additional lake bed area is being covered with water, there is a seepage loss into the banks of the reservoir, which loss is known as "bank storage" and later if the lake surface descends part of this water will return to the lake and be available for release through the dam, and this return of water is known as "bank release" and this increased amount of water is then subject to apportionment as other stored water. No deduction is made for this seepage loss from the additional stored water as previously determined for the reason that this water going into bank storage is in addition to the amount of water held in storage in the dam as determined by the capacity curve. The amount of bank release is measured by comparing the difference between inflow and outflow with the change of contents [217] of stored water in the reservoir. Inflow into the reservoir is a total of the inflow from the Gila River plus the inflow of the San Carlos River plus the rainfall on the lake. Outflow is the sum of the releases at Coolidge dam plus the evaporation losses. As an example, if 1000 acre feet of water was the inflow during any one month, and the outflow was 3000 acre feet, and the loss in storage was only 1500 acre feet, then there was 500 acre feet more water available than can be accounted for and must have come from "bank release."

Therefore, in making an additional apportionment your Water Commissioner determines as

aforesaid the increments of gain in available stored water of the reservoir since last apportionment was made. To this is added net bank storage as measured by bank release. From this total is deducted the evaporation losses from later date to estimated time of use. The difference would be the amount of water available for apportionment to the defendants, allowing them to divert an equivalent amount of water from the natural flow of the stream at their points of diversion in disregard of the senior rights of the plaintiff.

The rights of the plaintiff are set forth in the decree. Certain of these rights are a right to divert the natural flow waters of the Gila River. Inasmuch as natural flow may be defined as the flow produced by nature and that would be there in nature's own condition, the plaintiff has the right to pass the water's flowing in the rivers above the dam through the reservoir to the extent of its priorities, and to use these waters for the irrigation of its lands. Such waters passed through the reservoir as natural flow cannot be considered an addition to the stored water contents of the reservoir and therefore a like amount of water cannot be apportioned to the upper valley defendants.

However, when the senior rights of the plaintiff are being satisfied from the natural flow available and there is sufficient natural flow waters available to satisfy later priorities, the defendants are entitled to their share of this natural flow on the same basis of priorities as is the plaintiff.

Section 4 of Article VIII, further provides:

“That water released at the will of the plaintiff and for the purposes of the plaintiff from the San Carlos Reservoir at any time after the date of this decree other than for the proper irrigation of 80,000 acres of land or its equivalent in the San Carlos project, shall be considered as stored in the San Carlos Reservoir at and after the date of such releases, and available as a basis for the above described apportionment of the natural flow to said defendants as it would be if such withdrawals had never been made.”

Therefore, at any time that the plaintiff should release water in excess of the amount needed for the proper irrigation of 80,000 acres of land or its equivalent on the San Carlos Project, your commissioner shall consider such excess amount of water as stored in the reservoir and shall take such excess amount of water into consideration in making apportionments to the named defendants. [218]

The data for all apportionments are shown in detail in your commissioner's Order of Apportionment. When the total amount of water available for apportionment has been shown, this amount is divided by 40,573.75 acres of lands having water rights established by the decree under the defendant canal companies listed as sharing in the apportionment. This apportionment in acre feet per acre

makes it possible for each canal company to readily determine its share of the apportionment.

Under Arts. IX and X of the decree it is provided that certain lands in the Winkelman valley shall have apportioned to them an equal amount of water per acre as was apportioned to the named defendants in the Duncan and Safford Valleys. Therefore the apportionment states that a like amount of water in acre feet per acre is apportioned to these named Winkelman valley lands.

These apportionments of water which are a right to divert from the natural flow of the stream in disregard of the senior rights of the plaintiff named in the decree are in addition to and not exclusive of their right to divert in their regular order of priorities whenever available, and it is so stated on each apportionment order. The original copy of each apportionment is filed with the Clerk of this Court and copies are sent to the interested parties.

V.

As to paragraph IV of said petition, without waiving his motion to strike heretofore filed herein, but specifically reserving, relying and insisting upon the same, your Water Commissioner denies that the upper valley water users have not received, and are not now receiving, the amount of water they were, or are, entitled to under the terms of said decree, but on the contrary alleges that they have heretofore received and are now receiving all the water of the Gila River to which they, or either

of them, were, or are, entitled to under and by virtue of the terms of said decree.

Wherefore your Water Commissioner having fully answered said petition prays an order of this court dismissing the same and for his costs.

JOHN C. GUNG'L,

Attorney at Law

711 Valley Bank Building

Tucson, Arizona

Attorney for Water Commissioner. [219]

State of Arizona,
County of Pima—ss.

Charles A. Firth, being first duly sworn, deposes and says, That he is the duly appointed, qualified and acting Water Commissioner herein; That he has read the Petition filed herein and knows the contents thereof; That he has read the above and foregoing answer and knows the contents thereof; That the matters and things alleged in said petition and which are denied in said answer are untrue in substance and in fact of his own knowledge, except as to the matters and things which are denied in said answer upon information and belief, and as to such matters he believes them to be untrue; That the matters and things alleged in said answer are true in substance and in fact of his own knowledge, except as to those matters and things therein alleged upon information and belief,

and to such matters and things he believes the same to be true.

CHARLES A. FIRTH.

Subscribed and sworn to before me this 23rd day of August, 1939 by Charles A. Firth.

[Seal]

M. W. JOHNSTON,

Notary Public.

My Commission expires August 7, 1940.

[Endorsed]: Receipt of a copy of answer of Water Commissioner is hereby admitted this 24th day of August, 1939. Bilby & Shoenhair. By: L. Beyer. Knapp, Boyle & Thompson M.C. [220]

[Endorsed]: Filed Aug. 24, 1939. [221]

[Title of District Court.]

May 1939 Term

At Tucson

EXCERPT OF MINUTE ENTRY OF
MONDAY, SEPTEMBER 25, 1939
(Globe Division)

Honorable Albert M. Sames, United States District Judge, presiding.

[Title of Cause.]

This case comes on regularly at this time for arguments of counsel as to issues to be determined on the Petition to Review Action of Water Commissioner and the interpretation of the decree en-

tered herein on June 29, 1935 in connection therewith.

Frank E. Flynn, Esquire, United States Attorney, appears for the Government, and on motion of the said United States Attorney,

It is ordered that Geraint Humphreys, Esquire, Chief Field Counsel, Indian Field Service, be admitted to practice in this Court specially in these proceedings.

Charles H. Reed, Esquire, appears as counsel for the San Carlos Irrigation District.

John C. Gung'l, Esquire, appears as counsel for the Gila Water Commissioner.

Ralph W. Bilby, Esquire, and B. G. Thompson, Esquire, appear as counsel for the petitioners to review action of the Water Commissioner, and

It is ordered that Guy Anderson, Esquire, be entered as associate counsel for petitioners for review.

It is ordered that the answer of the Water Commissioner as a party to the proceedings on the petition to review action of Water Commissioner be stricken.

On stipulation of respective counsel,

It is ordered that the said United States Attorney be allowed to adopt as a part of the Government's answer to the petition for review the answer of the Water Commissioner heretofore filed herein. [222]

Argument is now had by respective counsel as to the issues to be determined on the petition for

review and the interpretation of the Decree in connection therewith.

And thereupon at the hour of 12:00 o'clock noon further proceedings herein are ordered continued to the hour of 1:30 o'clock p.m. this date, to which time respective counsel are excused.

Subsequently at the hour of 1:30 o'clock p.m., all counsel are present and further proceedings are had as follows:

Further argument is now had by respective counsel as to the issues to be determined on the petition for review and the interpretation of the Decree in connection therewith, and

The matter of the interpretation of the Decree herein is now submitted and by the Court taken under advisement, and

It is ordered that counsel for the petitioners for review be allowed ten days within which to file their brief on the interpretation of the Decree and that the United States Attorney be allowed ten days thereafter within which to file the Government's authorities in opposition thereto." [223]

[Title of District Court and Cause.]

ORDER ON PETITION TO REVIEW ACTION
OF WATER COMMISSIONER.

The Court having heretofore considered the issues raised by the Petition to Review Action of Water Commissioner, heretofore filed by the Gila Valley

Irrigation District and other defendants in the above entitled cause, and the Court, having reviewed the action of said Water Commissioner in respect of the matters complained of and being fully advised in the law and the premises, does hereby find and conclude:

I.

That the provisions of the Decree heretofore entered in the above entitled cause relating to "stored water" are clear and unambiguous.

II.

That "stored water", as referred to in said decree and to be considered by the Water Commissioner in making apportionments to the upper valley users in disregard of the priorities of the lower users, as priorities are defined in Articles V, VI, and VII of said decree, means any water in the San Carlos Reservoir, impounded therein and available for discharge to the lower users, although such water accumulates through failure of the lower users to draw on the natural flow of the stream to the extent of their priorities; "accessions thereto" are all the waters flowing into said Reservoir in excess of the amount discharged therefrom [227] at the time of such inflow allowance being made for loss through evaporation and seepage; and "draft on stored water" is any discharge of water from said reservoir in excess of the amount of water flowing into the same at the time of such

discharge, or any release therefrom, at the will of the plaintiff, in excess of the amount of water necessary to irrigate eighty thousand acres of land, as prescribed in said decree.

III.

That said decree does not mean, nor does it provide, as is contended by petitioners, that after making the first apportionment in January of each year, the Water Commissioner, upon making additional apportionment to said Upper Valley Users during the period of said year, should take into account and apportion an additional amount of water equal to all water flowing into said Reservoir since the date of the last apportionment, less an estimated allowance for seepage and evaporation and less the amount of water which, by the terms of said decree, must be delivered to Kennecott Copper Corporation, Joseph J. Anderson, Grady L. Herring and T. H. B. Glasspie.

IV.

That the manner in which the Water Commissioner is now, and has heretofore been, apportioning stored waters is correctly set forth in plaintiff's answer to said petition and is in accordance with the provisions of said decree.

V.

That petitioners are not, and have not been, aggrieved by the actions of the Water Commissioner

in making apportionments of “stored water”, and that no order should be made compelling the Water Commissioner to make apportionments of [228] water in the manner requested in said petition.

Wherefore, it is hereby ordered, that the prayer of petitioners for an order instructing the Water Commissioner to make apportionments of water to said petitioners and to the users of water within said districts, as in said petition requested, be, and the same is hereby denied.

Done in open court this 22nd day of January, 1940.

ALBERT M. SAMES,
District Judge.

[Endorsed]: Filed Jan. 22, 1940. [229]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Gila Valley Irrigation District; Franklin Irrigation District; Roy A. Layton; Milton Lines; William Waldrom; Roy D. Williams, and J. D. Wilkins, defendants above named, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the Order on Petition to Review Action of Water Commissioner rendered in the above-entitled District Court in the

above-entitled cause on the 22nd day of January, 1940.

Signed: RALPH W. BILBY
T. K. SHOENHAIR
JAS P. BOYLE
C. T. KNAPP
B. G. THOMPSON

Attorneys for Appellants,
Valley National Building,
Tucson, Arizona.

[Endorsed]: Filed Mar. 14, 1940. [230]

[Title of District Court and Cause.]

STIPULATION

It is herein and hereby stipulated by and between counsel for plaintiff and defendants, that in making up the designation of parts of contents of record on appeal and record on appeal the Clerk of the United States District Court, for the District of Arizona, shall certify a copy of the decree entered herein June 29, 1935, including the stipulation for consent to the entry of said decree, as printed by the United States Government Printing Office in 1935 (as shown on the last page thereof), along with the record.

It is further stipulated that the defendants herein shall furnish to the Clerk of the United States District Court a copy of said printed decree and

stipulation, to be certified by said Clerk, and will also furnish to said Clerk four other copies of said decree and stipulation, which need not be certified.

It is further stipulated that the said printed decree and stipulation shall not be printed as a part of the record in this case, but that said decree and stipulation may be considered by the Court as a part of the record in this case for the purpose of appeal, and all the parts of said decree and stipulation which shall be referred to in the briefs shall be published in the [235] appendix to such briefs.

Dated April 6th, 1940.

KNAPP, BOYLE & THOMPSON,
B. G. THOMPSON,
ARTHUR HENDERSON,

910 Valley National Building,
Tucson, Arizona.

BILBY & SHOENHAIR,
RALPH W. BILBY,

610 Valley National Building,
Tucson, Arizona,

Attorneys for Defendants.

FRANK E. FLYNN,
United States Attorney,
204 U. S. Court House.

H. S. McCLUSKEY,
Special Attorney,
Ellis Building,
Phoenix, Arizona,

Attorneys for Plaintiff.

Approved: April 18th, 1940.

ALBERT M. SAMES,
Judge of the District Court.

[Endorsed]: Filed Apr. 15, 1940. [236]

In the United States District Court for the District
of Arizona

United States of America,
District of Arizona—ss.

I, Edward W. Scruggs, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said Court, including the records, papers and files in the case of United States of America, Plaintiff, versus Gila Valley Irrigation District, et al, Defendants, numbered E-59-Globe, on the docket of said Court.

I further certify that the enclosed Decree entered June 29, 1935, being section one of the transcript of record and containing pages thereof numbered 1 to 123, inclusive, together with the enclosed Reporter's Transcript of Proceedings of Monday, January 22, 1940, being section two of the transcript of record and containing pages thereof numbered 124 to 202, inclusive, and the attached pages numbered 203 to 237, inclusive, being section three of the transcript of record, contain a full, true and correct transcript of the proceedings of said

cause and all papers filed therein, together with the endorsements of filing thereon, called for in appellants' designation of the portions of the record, proceedings and evidence to be contained in the record and in the stipulation designating the contents of the record filed in said cause and made a part of the transcript attached hereto, as the same appear from the originals of record and on file in my office as such Clerk, in the City of Tucson, State and District aforesaid.

I further certify that the Clerk's fee for preparing and certifying to this said transcript of record amounts to the sum of \$102.50 and that said sum has been paid to me by counsel for the appellants.

Witness my hand and the seal of said Court this 20th day of May, 1940.

[Seal]

EDWARD W. SCRUGGS,
Clerk.

[Title of District Court and Cause.]

TESTIMONY

Be it remembered, that the hearing of the above entitled matter having heretofore been set by the Court, for hearing before the Court without a jury, for this time, ten o'clock a.m., Monday, January 22nd, 1940, comes now the United States by Frank E. Flynn, Esq., United States District Attorney, and by Geraint Humpherys, Chief Field Counsel, Indian Irrigation Service; comes C. A. Firth, Wa-

ter Commissioner under the Decree, by John C. Gung'l, Esq., and the defendants by their counsel, B. G. Thompson, Esq., of Knapp, Boyle & Thompson, and Ralph W. Bilby, Esq., of Bilby & Schoenhair, and all parties announcing themselves ready, the following proceedings were had:

The Court: Gentlemen, this was the time fixed for the tendering of the testimony that either of the parties desire to offer to the Court on the petition, before the final order is entered on the petition for a review of the Water Commissioner. Are you ready to proceed, Gentlemen?

Mr. Thompson: We are ready, your Honor. [125]

The Court: The Government is ready?

Mr. Flynn: Yes, your Honor.

The Court: Very well, proceed.

Mr. Thompson: We would like to proffer testimony taken at a former hearing, your Honor.

Mr. Bilby: I might state, your Honor, that that testimony was taken in the presence of Government representatives and that they have copies of it, so they are apprised of what it is. I think it would save a lot of time.

Mr. Flynn: As I understand it, it is merely an offer, and of course we would like to have the record show our objections to it, on the ground that it is immaterial and irrelevant. Of course, without knowing what it is, I am not familiar with the testimony, and there may be many grounds on which it is objectionable in addition to the fact that it is not admissible for the purpose of varying or de-

termining the judgment and decree of this Court, that is, that the judgment of this Court is clear and plain and therefore any oral testimony or any testimony whatsoever would be inadmissible to explain or change it for the purpose of interpreting the decree. That is our objection. Now, as we say, it might be immaterial for other reasons, but even if the testimony were admissible for that purpose, this testimony probably would be objectionable on the ground it would not help to determine the decree of this Court, which is not ambiguous, so we would like to reserve [126] all these objections and exceptions to the offer, and it is my understanding that it is made for the purpose of the record, and we have no objection to it being made in this way. Of course, if admitted in evidence, we would object because we would want an opportunity of cross-examination.

The Court: I understand your tender is merely for the purpose of making the testimony available in that form, if admitted by the Court?

Mr. Thompson: That is correct, your Honor.

The Court: Merely as a matter of tender?

Mr. Thompson: Your Honor, we understand the Court has already ruled and necessarily found that the contract is unambiguous, and the Court said we would have a right to offer testimony and we would want to make our offer of proof just for the purpose of the record.

The Court: That tender is sufficiently clear for your purposes for the record, Gentlemen?

Mr. Thompson: Well, I think that we would like to have this marked and then we will refer to the specific pages, some of which was just conversation, which, as you will recall, Mr. Humpherys, had no part in the testimony.

(The Document was marked by the Clerk
Petitioners' Exhibit No. 1 for identification.)

Mr. Thompson: Referring now to the Petitioners' Exhibit Number One for Identification, your Honor, we want to [127] offer, to make an offer to prove certain facts, and in that connection offer to prove that if Mr. John L. Gust, attorney-at-law of Phoenix, Arizona, if he were sworn and propounded these questions, which appear on page 11 to and including part of page 42, that he would make substantially the same answers in response to the questions there set forth, and I presume that, for the purpose of the record, that the reporter would merely copy from this instrument for identification the questions that appear here and the answers made by Mr. Gust. Is that satisfactory to the Court and counsel?

Mr. Flynn: I think so; that is all right.

The Court: And copied into the record, if copied in, as your offer of proof?

Mr. Bilby: That if these questions were asked, he would make these answers, your Honor.

Mr. Flynn: And the record will show our objections to each of those offers upon each of the grounds which I have just stated?

Mr. Thompson: It is our understanding.

The Court: Very well.

(Following is the examination of John L. Gust from Petitioners' Exhibit No. 1 for identification):

“Examination of
JOHN L. GUST

By Mr. Bilby:

Q. Your name is John L. Gust?

A. Yes.

Q. You are an attorney practicing in Phoenix?
A. Yes. [128]

Q. And have been for a good many years?

A. About thirty years.

Q. You were practicing here prior to 1924 when the San Carlos Act was passed?

A. That is correct.

Q. Sometime about that time or prior thereto you were engaged as attorney for the Upper Valley Irrigation District, that is, the Gila Valley Irrigation District around Safford?

A. Yes, about that time.

Q. And continued to represent them for a number of years, did you not?
A. Yes.

Q. During the period covering the formation of this decree?

A. Yes, and for some time afterwards.

Q. And were attorney of record for them in the suit that was filed to determine priorities on the river?
A. I was.

(Testimony of John L. Gust.)

Q. That is the suit out of which this decree arose?

A. Yes. I may say during the hearing or taking of testimony that was taken in that suit I was not personally present but a member of my firm was and on all other matters I think I personally participated.

Q. You were conversant with what was going on in the hearings all the time?

A. I was.

Q. The purpose of that suit was to determine priorities primarily? [129]

A. It was to determine river rights. I don't know whether to say it would determine priorities would cover the whole thing or not.

Q. That was one purpose? A. Yes.

Q. After the suit was instituted the matter of taking testimony in order to determine water rights was referred to a master? A. It was.

Q. And considerable testimony was taken?

A. Yes, considerable, although the case was by no means anywhere near completed as far as the taking of the testimony was concerned.

Q. You kept in touch with these proceedings through a representative of your office?

A. Yes, Mr. Divelbess of our firm attended every hearing.

Q. And knew in substance what the testimony had shown? A. Yes.

(Testimony of John L. Gust.)

Q. After those hearings had been going on for some time and the evidence of the respective parties had been introduced was there a conference regarding this matter held in the office of the Secretary of the Interior in Washington?

A. I don't know whether you would call it a conference; there was a hearing before the Secretary of the Interior.

Q. Do you recall about when that was?

A. I can't give the exact date but it is of record here [130] somewhere. It was in December, 1930.

Q. Did you attend that? A. I did.

Q. Anyone else representing the Upper Valley land owners?

A. Mr. Walter Ellsworth, an engineer, representing them.

Q. Mr. Lynch was not there?

A. No, Mr. Lynch was not there.

Q. Who else was at the conference as near as you can recall? A. Mr. Truesdale was there.

Q. Representing whom?

A. At that time I don't suppose he had the same position, but he was very much in the same position that Mr. Humpherys occupied later. He was representing the San Carlos Indians and white people also on behalf of the Government.

Q. Who else?

A. There were a number of people there, I don't recall now who actually were present at that hear-

(Testimony of John L. Gust.)

ing except I know the Secretary of the Interior was there.

Q. It was held before him?

A. It was held before the Secretary in person, yes.

Q. Was the solicitor Mr. Finney there?

A. I have no present recollection that Mr. Finney was there at the time. He participated in the matter later and I believe he was present during the hearing although perhaps he didn't say anything.

Q. Can you recall whether there were any other representatives of the government besides Mr. Truesdale and Mr. Finney and the Secretary? [131]

A. I couldn't recall now. There were a number of people there.

Q. Can you state for the record what the purpose of that conference was and what came out of it?

A. Yes. For several years prior to that time the Upper Valley people whom we represented had been trying to make a settlement of this law suit and those negotiations had been made with Mr. Truesdale as representing the government,—sometimes there would be others who participated and sometimes to a certain extent the San Carlos District representing the white owners would participate, but the discussion was almost exclusively with Mr. Truesdale although we would have conferences here in Phoenix with representatives of all persons

(Testimony of John L. Gust.)

present. We were not able to agree and I think I should state what the point at issue was. The government claimed quite a large appropriation for the Indians.

Q. Do you recall approximately how much?

A. I think they claimed—I think in this final decree they were allowed about all they claimed. It is somewhere around close to fifty thousand acres, I guess. We felt that as far as appropriation was concerned they had only a very small acreage but they made the contention that the creation of the reservoir itself was a reservation from appropriation of sufficient water to irrigate the Indian lands. Of course they had some authority for that position. We didn't agree with that [132] contention. We further maintained that the passage of the San Carlos Act under the circumstances and the terms under which it was passed was a recognition of the rights of the Upper Valley people as they then existed and we endeavored from the beginning to secure for the Upper Valley people the right to continue to use the acreage that they had brought into cultivation in the way in which they had been accustomed to irrigate it. In other words, the people up there felt very strenuously since the government had allowed them to go up there and take up these lands under the homestead and desert land acts and establish their homes there that the government ought not to contend that the water that they had used for that purpose was illeg-

(Testimony of John L. Gust.)

ally taken. I remember Mr. McGrath made a very eloquent speech on that subject at one time which I wish had been preserved, but it wasn't. We of course knew that our position in that respect was not above attack by reason of certain decisions. However, we hoped if the case was tried, to prevail on our contention and we felt more strongly we could prevail on the question by the fact that Congress recognized these rights and didn't intend to destroy these rights by the passage of the San Carlos Act, in that they provided for the building of the San Carlos Reservoir in order to make good to the Indians in the shape of stored water, whatever natural flow rights they had had at an earlier date and which had not been maintained for them by the government. [133] So in all of our negotiations with Mr. Truesdale that was the question, as to how we could secure for the upper people by way of settlement the right to continue cultivating their lands as they had theretofore been cultivating, and while he at times acknowledged the justness of our position we were never able to agree upon any method by which that might be accomplished. Any suggestions which were made by him we didn't feel were adequate.

Q. You are speaking of suggestions made prior to the conference before the Secretary?

A. I am speaking about suggestions made prior to the conference, and I say furthermore if I understand Mr. Firth correctly as to the way he is

(Testimony of John L. Gust.)

now computing this water, that was what Mr. Truesdale was arguing for at that time prior to the hearing in Washington and to which we would not subscribe.

Q. Pardon me for interrupting you, may I ask at this time would Mr. Firth's manner of interpreting the decree give to the Upper Valley water users the right to use the water as they always had prior to the passage of the San Carlos Act?

A. Well, it is obvious that under some conditions it would not. Whether those conditions when they exist and when they do not exist, I do not know, that would be a matter of computation for the engineers, but under some conditions certainly would not. I think that hearing in [134] Washington before Secretary Wilbur was arranged for through Mr. Ellsworth, at least the first I knew of it Mr. Ellsworth asked me to go back to Washington with Mr. Elliott, and attend a hearing there and we went. We didn't have a very long hearing before the Secretary but we stated in substance our position, that here were these lands out here, these people had built their homes with the acquiescence of the government on the reliance of these water rights; here was the San Carlos Act passed and we didn't believe that that act intended to take away what these people had built up there and we thought an agreement could be worked out if the Secretary would indicate that that was his desire that that be done. Promptly upon the conclusion of the hear-

(Testimony of John L. Gust.)

ing, without any consideration, he suggested to us that he thought that should be done and suggested that we have a meeting right then and there with his assistant and see if something couldn't be arranged. We withdrew from the hearing and that day or the next day or maybe a couple of days, Mr. Truesdale, myself, Mr. Elliott and Mr. Finney and I think there were probably a couple of others on behalf of the government, discussed this situation and we tried to carry out the Secretary's suggestion and a letter was written by Mr. Finney stating the conclusions,—I think you have that and I think it should be produced here.

Q. I will ask you to examine this and state whether or not this is a copy of the letter which Mr. Finney wrote? [135]

A. Yes, it is. This is not the original, I don't know where the original is. I had a copy, not a signed copy. That came from my file.

Q. This is what was furnished you through the mail by Mr. Finney, your copy that was sent you?

A. No, I think I brought it with me from Washington. It was given to me there as a copy I got from Mr. Finney. The original letter was obtained and signed by the Secretary.

Q. The original showed the approval of the Secretary as this copy does?

A. Yes, the original was signed by the Secretary.

(Testimony of John L. Gust.)

Mr. Bilby: We want this marked as part of the record.

(Document marked Exhibit No. 2.)

Q. Mr. Gust, I suppose that no doubt Mr. Truesdale was furnished a copy of this too?

A. Yes, he received a copy right then and there.

Q. After that conference and after receiving this letter you came on back and I suppose resumed negotiations out here?

A. Yes, I came back with Mr. Elliott and I think it was early in the following year Mr. Truesdale came here. We got all the people together and had a discussion over here in the Federal Building concerning the situation. Mr. Truesdale in trying to carry out the suggestion of the Secretary had materially changed his attitude in regard to the extent to which he was willing to go to [136] effect a settlement.

Q. In your subsequent negotiations your effort was to carry out what the Secretary had suggested here, is that correct?

A. Yes, absolutely.

Q. And particularly in regard to the first paragraph here "that the water users in the Safford and other irrigation districts in Arizona and New Mexico above the San Carlos Dam should be protected insofar as their lands placed under irrigation and agricultural use prior to the date of the San Carlos Act of 1924 or such other date as may be agreed upon are concerned"?

(Testimony of John L. Gust.)

A. There is no question from that date on Mr. Truesdale, representing the government, tried in absolute good faith, to carry out that direction and that was the thing we were all aiming at.

Q. Did he give you a memorandum of the suggested paragraph in the decree to carry out this suggestion?

A. He gave me more than one, I think. Have you one there?

Q. I have one which you gave me from your file. I would like you to examine it and state whether or not you received this from him?

A. Yes, I think this is a memorandum that was probably presented at the meeting that we had early in January or February after we had that hearing in Washington, or it may have been presented to me personally and not at the hearing; it may have been written up afterwards. [137]

Q. By whom?

A. By Mr. Truesdale. That was not the first time this proposition of substituted storage had been discussed; that had been discussed long prior to this hearing but this is the first time it was put in this form. I am assuming now that this was the particular form that was put up at that hearing or about that time and I think it was. Some form was put up at that time and I think that is the one.

Q. You gave me this from your file?

A. Yes.

(Testimony of John L. Gust.)

Q. You are sure that this is one at least that you received from Mr. Truesdale?

A. Absolutely sure of that, yes, sir.

Q. Of course there were a great many conferences after this meeting with the Secretary in an attempt to formulate a decree that would carry out his suggestion, is that right?

A. Yes. What happened about that time was after we had had that general meeting here and we seemed to agree upon the principle of the thing, why then it was left to the engineers to work out the schedules; that was Mr. Elliott and I think a Mr. Ward representing the government and they worked a very long time, so long that I remember some of our clients thought they were working too long. However, the job was really quite a job to work out those schedules and while that was going on a formal decree was written up. [138]

Q. Who did that?

A. Mr. Truesdale, and that decree I find left blank this paragraph 8—if you want it you may have it—(handing document to Mr. Bilby). It is pretty much the same as it was finally worked out but paragraph 8 was not inserted in that. It left that to a little later consideration.

Mr. Bilby: Will you mark this Exhibit 3?

(Document referred to marked Exhibit No. 3.)

Mr. Bilby: Exhibit No. 3 is the document which Mr. Gust stated was given to him by Mr. Trues-

(Testimony of John L. Gust.)

dale as a suggestion for the part of the decree covering this question.

Mr. Gust: There should go with that another paper I have here that was handed me also by Mr. Truesdale that made suggestions in general for this paragraph No. 8. However, that is not yet the form in which it was written up. I haven't told you this but in making a search last night I found where this form that we have in the decree originated.

Q. Where did it originate?

A. At a later date it was prepared by Mr. Truesdale and handed to me and I think—there may be some very slight changes, but on this point, except for the fact that the date of the year that the original apportionment was to be made was changed from October to January I think this is the language I have here now as it was written by [139] Mr. Truesdale and as it was accepted by me and finally by Mr. Lynch and by our clients.

Q. Mr. Lynch made the suggestion, did he not, for the change of the date of apportionment? It was originally suggested that it be October first and he suggested that it be changed to January first?

A. No, I think Mr. Elliott made that suggestion; Mr. Ellsworth had something to do about it. Mr. Lynch made the suggestion it be changed to February first and from that suggestion it was decided to make it January first.

Q. A good part of these discussions, and there must have been lots of them, and conferences re-

(Testimony of John L. Gust.)

volved around the matter of handling these stored waters so as to permit the Upper Valley users to enjoy the same rights as they were enjoying prior to and at 1924, is that correct? That was a good part of your discussion?

A. Well, I don't know whether I can say that or not, after that hearing in Washington. We had been discussing that before that hearing and got nowhere. After that hearing in Washington when we came back here and had our meeting it was sort of understood that it was a question of wording it but it was going to be worked out in accordance with the Secretary's instructions so to speak. Perhaps most of that discussion was between myself and Mr. Truesdale.

I think maybe I ought to say something about the [140] problem as I understood it. Mr. Truesdale asked us to concede a prior appropriation to all the rights that the Indians were claiming. As far as the white lands were concerned there was no controversy because there was a decree in the Florence-Casa Grande Project and there was a decree of priorities in the upper project and while the two hadn't been tried out together we accepted them except that there might be a piece of land or two involved; in general there was no question there as to the date of appropriation. But as to the Indian lands we felt of course that these Indians were not entitled to a priority for any such amount as they were claiming. But Mr. Truesdale was very

(Testimony of John L. Gust.)

anxious to make that finding in the decree for the reason that he wanted to maintain the position he had taken and I think the government was then taking and perhaps is taking still based on the old Winters case that the creation of the reservoir gave them a prior right and that is something that they want to strengthen every way they could and we were willing that they could strengthen it as long as it didn't hurt us. We talked on the basis of letting them have what they claimed there, providing in some way they could protect us against it and Mr. Truesdale's idea was that the way to do so was substituted storage and from that time, that is, from the beginning up to the date when that was written up in its final form a part of that plan was to pay something for that substituted storage right. Several [141] amounts per acre were discussed but that was finally eliminated because after we agreed upon the form in which this was to be put in I think our clients talked Mr. Truesdale out of it, I didn't,—I think Mr. Ellsworth or Mr. Wilson did, but this time we were getting some right there for which we were paying or would pay.

Q. Was that the basis upon which you conceded the prior rights to this excessive amount of land for the Indians?

A. Yes, what we figured out was this, that there were four limitations to be placed upon the use of water on the upper valleys: One was the fact that the limitation of the amount of water in the river.

(Testimony of John L. Gust.)

The upper people couldn't get any water unless it was flowing in the river at the time when they desired to use it, which was the greatest limitation of all. The next was six acre feet per annum of consumptive use. The next was 120,000 acre feet per year for the projects. Then the fourth was this one and Mr. Elliott and I figured on this thing a long time, that this one was not to come into operation because the others were sufficient for all the purposes of the lower project. Of course on the basis of the figures from past records the work was done by Mr. Elliott, I was not able to do that computation, but he did make that computation and had some figures and while I didn't attempt to study his figures in detail he assured me except in an entirely unprecedented condition, which had never existed as far as the records disclosed, that this [142] situation whereby the reservoir would go dry and water be distributed according to priorities, something that wouldn't happen, on the basis of the past records and that is what was represented to our clients, I am sure; I know I told them that and I know Mr. Elliott told them that. That is the thing we tried to get there because we figured that the water in the river,—we couldn't take it except when it was available, we were limited to six acre feet consumptive use and 120,000 acre feet per annum, that those alone would accomplish what the Secretary had promised us and asked us to concede and this other was only a propo-

(Testimony of John L. Gust.)

sition of upsetting the allowances, overcoming the allowances to the Indians of the full appropriation which they claimed.

Q. In other words you conceded a priority for a great many more acres of Indian lands than you would have otherwise conceded had you not gotten the concession that the Secretary of the Interior gave you?

A. Yes. They had no evidence in there. I think they had some evidence in there probably of about 20,000 acres of Indian lands that had been irrigated. As a matter of fact the way they got that evidence they had somebody in the early days that went over the ground and saw the land that had been irrigated for sometime, but we who live in the West know how these Indians irrigate. They irrigate one patch and then the next. These early settlers said that the Indians irrigated all the land that had been [143] irrigated. We knew that wasn't true. We figured that they hadn't irrigated more than five thousand acres at the most although every one connected with the Indian Department will tell you it was more than that but the reason they get that is from the old records, they irrigate one piece this year and another piece the next and then add them together. We figured they might get possibly 15,000 acres but we never figured a larger appropriation than that, based on actual use.

Q. Then why did you concede 37,000?

(Testimony of John L. Gust.)

A. As I said before we conceded that in return for the proposition of substituted storage so we figured that that proposition would never come into operation. I want to make a modification of that last, we always discussed that of course it might be possible that there might be some dry period greater than ever occurred when possibly there might be some extreme case when it would come into operation but as far as the records in the past were concerned it would not.

Q. In other words, you figured the decree as consented to by you was such that the Secretary's direction would be carried out in that your clients would not be disturbed in the use of the water in the same manner as they had used it before?

A. That is correct.

Q. In working on the drafting of the decree or in criticizing and going over the drafts that had been prepared [144] and presented to you by Mr. Truesdale and in finally agreeing to the form of the decree that was adopted did you consider that you had accomplished what the Secretary had directed in his letter?

A. If I hadn't I would not have approved it.

Q. In these conferences I assume both before and possibly after the meeting with the Secretary of the Interior was there advanced this idea of a reservoir off to the side fed by a feeder canal? Are you familiar with that theory?

(Testimony of John L. Gust.)

A. It was not at any time prior to the time that we had agreed upon the form of the decree. This form of decree which I gave you there, when it was first written up, which I said was accepted by me, was presented by Mr. Truesdale I think early in 1933 I believe and it was presented by him to me and I took it under consideration and he pointed out to me at that time that that language in the decree would do what I had been asking him to do which was this: That we would get by way of this substituted storage proposition as far as it was concerned one half of the water that they got for their eighty thousand acre project and if they increased the project over eighty thousand acres we were not concerned with that. I will explain that in this way, at the beginning of the year the amount of water that was stored there above the dead-line, some certain amount of water that they can never take out as I understand it, but the amount that was available for use was to be divided fifty-fifty, we [145] were to be allowed half of that and they the other half so to speak. We didn't get that half out of the river but we got water out of the river equal to half of it. Then whenever we made an apportionment or whenever an apportionment was made at a later date it was made on the same basis. That was of course all the water that flowed into the reservoir except it went to some outside user. Of course there were outside users that were known. Mr. Truesdale suggested that there might be out-

(Testimony of John L. Gust.)

side users that were not known, for instance, Buckeye was mentioned as might come up as it had I think,—maybe it had a suit pending at that time or was threatening one, making some claims for water. He said “Of course we can’t take any of this substituted storage proposition, this is water we have to let go through the reservoir to other people”, and we said, “Of course not, but we want all the water that goes into the reservoir to be taken into consideration”, and we had a discussion over the form of the decree or partial form of the decree on this particular proposition as to whether that would accomplish it or not. I finally came to the conclusion that it would and it was put up to Mr. Lynch and he pondered over it for a while. Mr. Lynch finally approved it. Now I wrote a letter——

Q. I was going to get to that. When the decree was drafted and accepted and signed you considered that it had accomplished that result that you were seeking? [146]

A. Yes, I have a letter here in which I said that. On June 28, 1933 I wrote a letter to Mr. Wilson, then Secretary of the Gila Valley Irrigation District in the concluding sentence of which I made the statement “that inasmuch as there will be additional apportionment every 30 days if there is any additional water” it wouldn’t make any difference as to what time of the year we made the original apportionment. That could only be made upon the basis of the opinion that I later wrote. I should

(Testimony of John L. Gust.)

show Mr. Firth as early as June 28, 1933, that I was of the same opinion that I afterwards expressed in my opinion to him.

Q. After the decree was put into effect and Mr. Firth was appointed as commissioner you were later advised of the interpretation he had put on that portion of it relating to stored waters and the manner in which he calculated his apportionments that were made to the upper valleys, were you not?

A. Yes, but I think before that time he had come over and talked to me about it and we didn't understand each other, we didn't get anywhere apparently.

Q. Did you agree with his version or interpretation?

A. No, I didn't.

Q. Was his interpretation in accordance with your understanding of what the decree had contained and was to contain?

A. No.

Q. Did you write an opinion covering what you thought [147] the decree meant?

A. Somebody sent me three questions,—I think they had originated with Mr. Firth, I think he must have made them up, I didn't agree with any one of them, so I wrote an opinion. I think Mr. Wilson or Mr. Kimball or whoever was the secretary at that time said they would like to have an opinion for their board to consider so I took four or five days to write that letter which I did write, in which I set up at the end a method that I thought Mr. Firth ought to follow.

(Testimony of John L. Gust.)

Q. Will you examine this and state whether or not this is a copy of that opinion which you sent?

A. Yes, I examined this this morning with the copy in my office and it is a copy of the opinion that I wrote except that when I wrote it I sent a copy to Mr. Lynch and he called my attention to the fact that I had made an error, or in writing it up an error had been made, I had used the word "next" for "last" on the next to the last page and in checking it over with the decree I found another error in it in referring to the decree, I referred to Article 6 and it should have been Article 7.

Q. Did you correct those in that copy you have now, both of these errors?

A. Yes, they were corrected.

Mr. Bilby: I would like to have this marked for the record.

(Document marked as Exhibit No. 4.) [148]

Q. Mr. Gust, did that opinion express not only your idea of what the decree actually meant, what it said, but your idea and intention as to what it should mean when you agreed to it being signed?

A. Yes, it did.

Q. Did that portion of it, interpreted as you say it should be, in your opinion carry out the instructions or suggestions of the Secretary of the Interior?

A. To the best of my opinion it would. I think I should call attention to something in the decree here in Paragraph 8. The decree says that very

(Testimony of John L. Gust.)

thing that is intended to do that. I didn't mention it in that letter, maybe I should have but it is there.

Q. Will you read into the record that portion you have reference to?

A. This language I am about to read just precedes that portion of the decree which is under discussion. It reads as follows: "It being evidenced thereby that the earliest right of plaintiff is prior in time to all and every rights of said defendants and certain of plaintiff's other rights are prior in time to certain rights of said defendants. That, however, plaintiff and said defendants in recognition of the desirability of making it practicable for said defendants to carry on the irrigation of said upper valley lands to the extent to which the areas to which their said rights apply heretofore have been irrigated and so that said San Carlos Act [149] shall inure in part to their benefit and this suit may be compromised and settled, have agreed that the following provisions shall be and they are hereby embodied in this decree, which said provisions in turn and insofar as they affect the other parties in the case shall inure to the benefit of and be binding upon them, to-wit". Then follows this provision which is said to be put in for the purpose of accomplishing what I just read.

Q. And what the Secretary directed?

A. Yes.

(Testimony of John L. Gust.)

Q. In your instruction and intention as you have stated, after the original apportionment has been made at the first of the year then in making subsequent apportionments it was your thought and intention in consenting to the decree that the commissioner should take into account all waters that ran into the reservoir as shown by the gauging stations at Calva and Peridot less proper allowances for seepage and evaporation and the proper allowances for those named in the decree who were excepted from it, namely, Kennicott Copper Company and Anderson and two or three others and that he should add that to the amount that was in the reservoir at the time of the last apportionment without regard to whether or not an equivalent amount had been drawn out in the meantime?

A. If that equivalent amount was drawn out for the benefit of the Indians or white lands in the San Carlos Project that were provided for by this decree.

Q. In other words, to use an illustration, let's [150] assume that there was sufficient water in the reservoir at the beginning of the year, January first, to afford an apportionment of two acre feet to the Upper Valley defendants. Let's assume in the meantime for the period of another month before another apportionment was made a quantity of water runs into the reservoir sufficient to supply the needs of the lower valley to the extent of its eighty thousand acres entitled to be irrigated and

(Testimony of John L. Gust.)

that amount is taken out of the reservoir with the net result that its elevation is neither raised nor lowered. Under your theory we would be entitled to an apportionment of the amount that would have run in there in the meantime?

A. I don't think the raising or lowering of it has anything to do with it. If it did what is the use of making an allowance for the evaporation and seepage. The evaporation and seepage would be taken care of in the going down or going up and there wouldn't be any need for any provision in the decree to make such allowances. Another reason that we didn't want it that way and I don't think anybody wanted it that way, was this, that that would base the rights of the Upper Valley people upon the way in which the water was taken out and put a temptation on the lower people to cut down the supply up above. It would make it possible to do that to a certain extent.

Q. That phase of the discussion was pointed out?

A. It was discussed between Mr. Truesdale and myself.

Q. Before the decree was signed? [151]

A. I don't believe it was discussed after the hearing in Washington, it was before that time.

Q. This letter from the solicitor to the Secretary and approved by the Secretary is dated December 13, 1930. The decree was not actually signed until June 29, 1935. Was all that time consumed

(Testimony of John L. Gust.)

in arguing over the provisions of the decree or what caused that delay?

A. I suppose I will not be speaking out of turn when I say that the government proceeds with deliberation at all times and I think that was the reason principally. But I will say that the form of the decree was agreed upon I believe in the first half of 1933 but at all events in 1933 because I find in my files here a letter I wrote other people early in 1934 saying that the decree had been agreed upon and that the formal signing was deferred in the matter of working out certain details with respect to schedules and other matters of that kind and getting them all together to sign up.

Q. That caused a good part of that delay?

A. Yes.

Q. You are much more familiar with this matter than any of us, Mr. Gust, having represented these defendants for this period of time. Is there any statement you would like to make to clarify it?

A. There is one thing. You asked Mr. Firth here about the difference in the amount of water the upper people would have according to the method I gave him and the [152] method he followed and I think he said 34,000 acre feet. I don't believe that means water, I think that means theoretical water. I don't believe there is any such difference in actual fact because I don't believe the water would have been in the river to take it out. In other words,

(Testimony of John L. Gust.)

if he had used the method I suggested this substituted storage limitation wouldn't have come into operation this year and they wouldn't have gotten as much as 34,000 acre feet additional but they would have gotten some more than they have now and this limitation wouldn't have had any effect. Isn't that the situation?

Mr. Firth: Partially so. Naturally if they had this .8500 acre foot apportionment I wouldn't have had to close.

Q. Mr. Gust, you say it wouldn't make that much difference. It was about 86/100ths of an acre foot difference.

You say it wouldn't have made that much actual difference because at the time they wanted to take the water the water wasn't in the river?

A. I said I didn't believe it would. I am not an engineer but that is my idea. Because the water wasn't in the river they wouldn't have gotten part of it anyway.

Q. Isn't this a fact, if this method of apportionment had been in effect their apportionment earlier in the year when there was water to take would have been greater, hence they would have been justified in taking more water than they did. In other words, they wouldn't use up right [153] to the last bit of their apportionment and leave themselves without any water?

A. I am not able to figure out exactly how it would work only I understood Mr. Firth's figures

(Testimony of John L. Gust.)

to be the figures based on computation, not on actual operation.

Q. But it is a fact, is it not,—this may be argumentative, if they had an apportionment we will say at the beginning of the year of four acre feet they would be justified in using water when it was in the river a lot more frequently than if they had one acre foot? A. Provided they needed it.

Q. They would be conserving it, it would make a difference in that manner?

A. It would make a difference, no question about that. Another thing, the method that Mr. Firth uses here I don't think squares with any interpretation of this decree. There will have to be some readjustment of that somewhere because to my mind it doesn't fit any interpretation you can make. As I understand him he goes entirely by the lowering or raising of the water in the reservoir. If it doesn't go up there is no additional apportionment unless they take water out for acreage above the eighty thousand acres, which I suppose they are not doing. That would have to be, if it could be justified in any interpretation of the decree it couldn't be on the theory Mr. Firth has. It couldn't be justified on the theory, I don't think, by the reservoir being by the side, which it is not. [154] One time after we had agreed upon the form of the decree Mr. Truesdale wrote a letter in which he made that suggestion. I didn't understand what he

(Testimony of John L. Gust.)

meant by that letter and I didn't answer it but he came over and we discussed it and after a discussion with him I was satisfied he subscribed to what he had stated to me when he first presented this form, that this accomplished what I wanted. I don't know of anything else.

Q. State it a little more fully why you think there is nothing in the decree which would justify Mr. Firth. You think there is no language in the decree that authorizes the construction of that contract?

A. As a lawyer I do not. Mr. Firth is doing the same thing my engineering friends are always doing on me, they interpret the language different than the lawyers do.

By Mr. Humpherys:

Q. Mr. Gust, in 1935 in the fore part of April, along about the 15th I think, you as attorney for most of these defendants signed a stipulation which is embodied in the bound volume of the decree?

A. I did as attorney for all lands in the Gila Valley Irrigation District and some few, some small acreage outside I think, but practically it was confined to the lands in the Gila Valley Irrigation District. They had a method of communicating with the land owners up there and advised me this was satisfactory to the land owners and I signed it as attorney for them. [155]

(Testimony of John L. Gust.)

By Mr. Firth:

Q. How do you determine the quantity of water in the San Carlos Reservoir for your first apportionment?

A. I don't know what the condition is now. That may be the actual water in the reservoir above the deadline or it may be the theoretical water that should be there if they have taken any out above what is properly required for an eighty thousand acre project.

Q. Then on the first day of January, 1936 when I started the operation of this decree I had to make an apportionment? A. Yes.

Q. How would I determine what quantity of water was there?

A. You determine it by the quantity of water that is actually there, by elevation, yes.

Q. That elevation corresponds to a certain quantity of water by capacity curve or whatever you might have to determine it.

A. That is the quantity of water actually there. I don't know about your engineering methods, that is up to you. Maybe I ought to say one thing more. As I said I don't think Mr. Firth's method squares with it but the theory here evidently is that water that is taken out of the reservoir for the irrigation of these lands, Indian lands and white lands provided for by the decree is not stored water but is taken out in satisfaction of their prior appropriations that they were awarded in the decree. In my

(Testimony of John L. Gust.)

letter that I wrote in 1936 I pointed to two [156] provisions in the decree which I believe show that as long as there is water in the reservoir the rights of these lands provided for in the decree are satisfied out of stored water and not out of prior appropriations, and of course if those rights are satisfied out of stored water then I think the rest of it follows, that as water flows in you are adding to the stored water and water that is taken out is stored water and no water except that which may be allowed to go to lands outside passes by the reservoir as is set forth in the illustration; but if we did take that theory that the water that was taken out of the reservoir was water taken as far as it was permissible in the decree, was taken to supply the prior appropriations that were allowed by the decree, we couldn't take it all because it is not distributed that way. Some of that water goes to lands that haven't any appropriation in the San Carlos Project, a good deal of it, and no account is kept as to where it goes, and if you wanted to work this out on the theory that a lot of this water that passes through the reservoir is just simply passed through without becoming stored you would have to figure each individual piece of land to which it went to see whether it had an appropriation or not because obviously [157] water that goes to supply some land that came into the project very recently down below cannot be said to supply a prior appropriation. My view is that under the decree all the rights as

(Testimony of John L. Gust.)

long as they are stored water are supplied out of stored supply and if that is true the interpretation that I make of the decree naturally follows I think. If you took the other view you would have to change your method Mr. Firth is now following and determine each particular piece of land that the water went to to determine whether it might be considered water passing through or whether it ought to be supplied from stored water.

Mr. Bilby: In other words, some of the white lands in the San Carlos Project have rights that are junior to some of the Upper Valley rights?

Mr. Gust: They brought in some that had no water right at all.

Mr. Bilby: Many of them are junior to those up there?

Mr. Gust: Oh, yes, a great many.

(After recess)

Mr. Gust: I want to correct an error I made this morning. In speaking of the provision of the decree providing for substituted storage I said that it was a fifty-fifty proposition and I followed that up by stating that the people on the upper river were awarded half of the water that was in the reservoir. A fifty-fifty proposition is all right but the statement that it was [158] half was plainly erroneous because the decree provides that the people in the upper river shall set aside to them an equal amount to that which is in the reservoir. I just want to make that correction.

(Testimony of John L. Gust.)

Mr. Bilby: You said something about Mr. Elliott, after you had had a conference with the Secretary of the Interior and agreed upon this plan, Mr. Elliott went back over a period of years and compiled some figures to show the effect of putting this plan into effect on the Upper Valley. Will you tell us a little about that?

Mr. Gust: Yes, he had I think made a computation of the amount of water that had been shown by the old figures as the flow in the river each year and he had prior to that time made a computation of how much water there would be available and I think there had been a similar computation made by another engineer who was employed at one time. After we had this hearing in Washington and it looked as if we were getting down to something definite I told him we wanted to be sure on this thing and asked him to figure out just how this would operate on this basis and he did that and he also had at that time a graph, I guess you would call it, showing how it would operate.

Mr. Bilby: You saw that?

Mr. Gust: Yes, I saw that. I don't think I have it now but I saw that graph and it showed what I said this morning was my understanding of the way this worked; that [159] it wouldn't come into operation on the basis of the figures for past years.

Mr. Bilby: In other words, the only way under your theory that the prior rights of the various

parties as set up in the decree would come into operation would be for the reservoir to be dry.

Mr. Gust: Yes. This graph showed if we continued to have about the same kind of weather we had in the past the reservoir wouldn't go dry on the basis of an eighty thousand acre project.

(Mr. Gust excused)."

Mr. Thompson: Then, your Honor, we offer to prove that Mr. J. M. Wilson, of Safford, Arizona, if he were sworn to testify and propounded the questions which appear in Petitioners' Exhibit 1 for Identification, beginning at page 42 and including to page 52, that he would make substantially the same answers to the questions that appear on those pages; and that if Mr. William Ellsworth, of Safford, Arizona, were sworn and testified in this cause and were propounded the questions which appear on pages 53 to 57 of Petitioners' Exhibit *I* that he would make substantially the same answers as are made on those pages. So there won't be any misunderstanding, the reporter will copy this and incorporate them in our offer of proof. We don't ask that all be copied, but merely the questions and answers. There are some extraneous matters in it, so that will all be clear of that, your Honor. My understanding [160] is that only the questions and answers will be copied; of course, as in any record, that is, there are observations of the

attorneys or questions that were outside of the issues here, and we are only offering the actual questions propounded to Mr. Gust and his answers to the same, so that the reporter will be clear on it; there are not many things other than the questions and answers, but there are a few.

(Following is the examination of J. M. Wilson from Petitioners' Exhibit No. 1 for Identification:)

“Examination of

J. M. WILSON

By Mr. Bilby:

Q. Will you give your name please?

A. J. M. Wilson.

Q. You live at Safford? A. Yes.

Q. What is your business there?

A. Some farming business, principally cattle raising and feeding.

Q. Have you been engaged in farming there in the past? A. Yes, sir.

Q. For how long?

A. For 27 years at Safford.

Q. You have been getting your water out of the Gila River? A. Yes, sir.

Q. Do you hold any position with the Gila Valley Irrigation District?

A. Yes, sir, I was secretary to the board. [161]

Q. For how long?

A. From its first organization which as I recall was in 1923, until immediately after the consent decree was signed.

(Testimony of J. M. Wilson.)

Q. So you were secretary all during the years that negotiations concerning the decree were carried on? A. Yes.

Q. Did you participate in the conferences and meetings concerning it? A. Yes, sir.

Q. Carry on the correspondence about it?

A. Yes, sir.

Q. Receive correspondence from Mr. Gust and the engineers? A. Yes, sir.

Q. Did you attend any conferences at which government representatives were present?

A. Yes, sir.

Q. Without attempting to name a specific conference or definitely who was present at each conference, can you tell us some of the government representatives who were at some of the conferences?

A. Most of the time Mr. Truesdale was there. Various attorneys from the Los Angeles office, some that were located here like Captain Smith and Mr. Martin at the time of the hearing before the master and after that there was Mr. Ward. I recall Mr. Humpherys once or twice and Mr. Wathen.

Q. In those conferences who, besides yourself, were *represent-* [162] *the* Upper Valley?

A. I think in every instance there was one or more directors, usually it was Mr. Ellsworth and probably one or both of the other directors.

Q. What position did Mr. Ellsworth hold at that time?

(Testimony of J. M. Wilson.)

A. If I remember correctly he has been president of the organization and still is.

Q. Was Mr. Gust there representing you as attorney? A. Yes, sir.

Q. And Mr. Lynch representing the Duncan Valley? A. Yes, sir.

Q. Was Mr. W. R. Elliott there in the capacity of an engineer? A. Yes, sir.

Q. Did you keep in close touch with the proceedings that were being had before the master prior to the conference you heard Mr. Gust tell about with the Secretary of the Interior?

A. The first few days we were there in attendance; after that we just received reports through Mr. Elliott and through Mr. Gust.

Q. Did those reports come to you as Secretary?

A. Yes, sir.

Q. You were advised of what was going on there? A. Yes, sir.

Q. And substantially what the testimony was?

A. Yes.

Q. Did you know about the conference that was held with [163] the Secretary of the Interior?

A. Yes, sir.

Q. Did you see the letter that the solicitor wrote to the Secretary and was approved by the Secretary, being Exhibit No. 2?

A. We were furnished a copy of it at the time.

Q. You had a copy of that as secretary?

A. Yes.

(Testimony of J. M. Wilson.)

Q. Prior to that time had the upper valleys been able to agree with the government representatives on any plan? No, sir.

Q. Was the plan outlined by the Secretary satisfactory to the upper valleys?

A. It was; I wouldn't say exactly satisfactory but we figured it was the best we could get and we could get by with it.

Q. You participated in the conference after that conference with the Secretary? A. Yes, sir.

Q. Was it your understanding that the decree that you were working on that was already signed was carrying out the instructions and suggestions of the Secretary?

A. Yes, sir, based on those instructions.

Q. Mr. Wilson, the decree provides and adjudicates that there is a prior right on behalf of some thirty-five or thirty-seven thousand acres of Indian lands that is ahead of anything in the upper valleys. Tell us how [164] it happened that that was in the decree. Did the Upper Valley people consent to that?

A. Until the time of the hearing and before we heard the evidence before the master we were of the opinion that they wouldn't be able to establish any such priorities. During that hearing we were convinced they could establish priorities to some acreage based on some opinion that our attorneys found had been upheld in like cases or similar cases. We therefore thought that if any priorities were

(Testimony of J. M. Wilson.)

granted to the Indians and they used the normal flow that it would take such a great quantity of water to reach them that it would put us so short up there that we wouldn't be able to proceed with our farming business, and, therefore, that some kind of a compromise must be reached.

Q. What did you understand you were getting in return for consenting that that great amount of acreage should have a prior right?

A. We figured we were getting just what the instructions that the Secretary handed down signed was given us. That is in round words we would be left alone as we were back in 1924.

Q. Was it in consideration of that that the water users and farmers up there consented to this adjudication of prior rights to the extent of 35,000 acres?

A. Yes, sir.

Q. Was that discussed at your meetings? [165]

A. Yes, sir.

Q. And discussed at meetings in which were the representatives of the government?

A. Yes, sir.

Q. Are you familiar with the interpretation that has been and is now being placed upon the decree with regard to stored waters and the apportionment of waters to the Upper Valley by the commissioner?

A. Yes, sir.

Q. In any of these conferences did you ever hear any government representatives make the contention for any such instruction as that?

(Testimony of J. M. Wilson.)

A. No, sir.

Q. When was the first time that was ever brought to your attention?

A. After Mr. Firth was appointed water commissioner and he had made such an interpretation the word came to me that he was so interpreting it.

Q. What did you do?

A. I don't know whether I did it on my own accord or the board asked me to go to Mr. Firth and try to explain to him what the situation was, that it was being wrongfully interpreted.

Q. Did you go to him? A. Yes, sir.

Q. Did you explain your contention at that time?

A. Yes, as best I could. [166]

Q. I think you then requested Mr. Gust to give you an opinion on behalf of the board, didn't you?

A. We did.

Q. That is the opinion that has been made part of the record, being Exhibit No. 4?

A. Yes, sir, that is it.

Q. Did that opinion express the understanding of yourself and other members of the board as to the meaning of that decree? A. Yes, sir.

Q. Is that what you thought you were getting when the decree was entered? A. Yes, sir.

Q. Did you hear in some of the conferences that you attended a discussion or contention on the part of some of the government representatives as to this theoretical reservoir being off to the side and being fed by feeder canals? A. No, sir.

(Testimony of J. M. Wilson.)

Q. You didn't hear that advanced at any time?

A. No, sir.

Q. Did the upper valleys ever agree to any such theory? A. No, sir.

Q. You say you had never heard of it before?

A. No, sir.

Q. You say it was your understanding that this decree as it was finally rendered would carry out the suggestion and direction of the Secretary of the Interior in that [167] it would leave you in the same position as you were before the San Carlos Act was passed. You used water out of the river prior to that time? A. Yes, sir.

Q. Had there ever been any restriction as far as that valley as a whole was concerned about taking water out of the river prior to that time?

A. No, sir.

Q. There was no claim asserted as to your right to take it out?

A. Not as to the valley as a whole.

Q. Except as between yourselves?

A. We had a decree that took care of the situation as between the canals but nothing that limited them as a whole.

Q. Nothing that limited them insofar as the so-called San Carlos Project was concerned?

A. No.

Q. There had never been any restriction placed upon you from their standpoint or any claim made until the San Carlos Act was passed?

(Testimony of J. M. Wilson.)

A. They may have made some claims but no litigation about it.

Q. Or no attempt to enforce any claims?

A. No, sir.

Q. At that time it was the continued practice to take the water out of the river whenever there was water there to take?

A. Yes.

Q. Speaking of the district as a whole? [168]

A. Yes, sir.

Q. Operating under the decree as it is now being interpreted by the commissioner are you permitted to take water out of the river whenever it is there as you were before?

A. No, sir.

Q. You are limited in that respect?

A. We are limited.

Q. Are there times when there is water passing by there and you are not permitted to take it?

A. Yes, sir.

Q. Are you then being given the right to operate as the Secretary suggested that you were as before the San Carlos Act was passed?

A. No, sir.

Q. You heard the statement this morning concerning the formula that Mr. Firth had worked out showing the difference that would result from applying his interpretation of the decree and applying that that Mr. Gust contended for, did you not?

A. I know of it, yes, sir.

Q. You know that in those figures by following the so-called Gust interpretation or the interpretation claimed by the Upper Valley water users you

(Testimony of J. M. Wilson.)

would have had an allotment of approximately 87/100ths of an acre foot more than you otherwise got? A. That is my understanding.

Q. For the current year of 1938?

A. Yes, sir.

Q. You heard some statements pro and con as to whether [169] or not the failure to get that apportionment actually resulted in the loss of any water to you. What is the effect in that connection? Will you explain to us?

A. It has at various times during this past summer resulted in us not being able to take water.

Q. Did it result in the loss of that amount of water or substantially that amount?

A. I think in most of it.

Q. Just resulted how?

A. Today there is water there at the heads of I believe all the canals. I think there are two or three canals which are not taking water now because their apportionment is practically used up. They may have a very very small apportionment left but they are not taking that water because the apportionment is so small that they had rather not plant the crops that they would ordinarily plant this time of year, but conserve what little apportionment they have left to take care of some crops they have already started.

Q. What is the practice with regard to taking water to the full extent of your allotment? Has it been the practice to use it all up?

(Testimony of J. M. Wilson.)

A. No, a good farmer wouldn't do that.

Q. Would he dare do it?

A. There might be times toward the end of the year that he might dare do it; any other time of the year, no, it wouldn't be good practice. He would rather let part [170] of his crop go in order to keep a little water to save the other portion of his crop a little later on.

Q. That is true because under the present manner of interpreting the decree you wouldn't get any more allotment unless sufficient water ran in to cause a rise in the level of the reservoir, is that right? A. Yes, sir.

Q. Have there been times during this current year when there was water in the river that you could have taken had you dared to do it with the small allotment that you had left?

A. There have been several times.

Q. But you didn't take it? A. That is right.

Q. Because as I understand you you didn't dare to use up your entire allotment, is that correct?

A. Yes, sir.

Q. Putting it this way, if you had a large allotment at the beginning of the year you would take out more water as you went along than you would with a small allotment? A. That is right.

Q. There is usually more water in the spring of the year than there is in the hot part of the summer, is there not? A. Yes, sir.

(Mr. Wilson excused)''

(Following is statement of William Ellsworth from Petitioner's Exhibit No. 1 for Identification:)

“Examination of

WILLIAM ELLSWORTH

By Mr. Bilby:

Q. Your name is William Ellsworth?

A. Yes, sir.

Q. You are a farmer in the Safford Valley?

A. Yes, sir.

Q. And have been all your life?

A. 52 years.

Q. During all that time you have been irrigating your lands with water from what source?

A. The Gila River.

Q. And you were so irrigating your lands long before they passed the San Carlos Act?

A. Yes, sir.

Q. You are president of the Gila Valley Irrigation District? A. Yes, sir.

Q. And have been since its organization continuously?

A. Yes, sir, I have been president and a member of the Board.

Q. Either president or member of the board at all times? A. Yes, sir.

Q. Were you president during a good part of the time that negotiations were being carried on concerning the framing of this consent decree?

A. Yes, sir.

(Testimony of William Ellsworth.)

Q. Did you participate in the conferences?

A. Most of them or some of them.

[172]

Q. Did you attend a conference in Washington with the Secretary of the Interior?

A. No, sir.

Q. Did you request Mr. Gust and Mr. Elliott to go on behalf of the Irrigation District?

A. Yes, sir.

Q. You had taken part in the negotiations that had been carried on before that time, had you not?

A. Yes, sir.

Q. And knew that you hadn't been able to agree with the government representatives?

A. That is right.

Q. Did you have something to do with arranging that conference?

A. Yes, sir.

Q. You knew what the purpose of it was?

A. Yes, sir.

Q. Did you learn the result of it? Do you know what happened as a result of the conference?

A. Yes, we had a report of it when they came back.

Q. Was that reasonably satisfactory to the Upper Valley?

A. Yes, sir, very satisfactory.

Q. What in your mind was the big point coming out of that conference, what did it mean to you?

A. My thought was that we was going to get a settlement and get the same right to use water out of the river that we had always been having. [173]

(Testimony of William Ellsworth.)

Q. That is in accordance with the Secretary's statement? A. Yes, sir.

Q. In carrying on your negotiations or framing the decree after the Secretary had made that statement was that what you were driving at all the time?

A. Yes, sir.

Q. When the decree was finally prepared did you go over it and read it?

A. Yes, sir, we went over it and read it or heard it read.

Q. Was it entirely clear to you?

A. No, there was about half of it I never did understand.

Q. Upon whose advice did you rely as to what it meant?

A. I relied on our engineer and our attorney.

Q. What was their statement to you as to what it did represent in regard to whether or not you were getting what you thought you were getting, namely, the right to use the water that you had theretofore used? Did they represent that it did so advise? A. Yes, sir.

Q. Was that your understanding of your consent to it? A. Yes, sir.

Q. In the interpretation that is put on it now are you able to use the water as you did before?

A. Not quite. There has been a little difference. Up to this season I don't think it hurt us any much, but this season we have been hurt quite a bit by it by not having allotted to us as much water as we needed. [174]

(Testimony of William Ellsworth.)

Q. By not having as much as you needed or as much as you thought you were entitled to under the decree? A. Yes.

Q. Had that amount been allotted to you would you have used it while there was water in the river to use?

A. We would have used the biggest part of it.

Q. Has the failure to get that allotment in accordance with your contention as to the construction of the decree resulted in a substantial loss of water to you? A. Yes, sir.

Q. Has it resulted in a substantial loss of crops to you? A. Yes, sir.

Q. You requested an opinion from Mr. Gust as to the construction that should be placed on this decree? A. Yes, sir.

Q. He rendered that opinion? A. Yes.

Q. Does that opinion express what you understood you were getting at the time you consented to the decree?

A. Yes, sir, just exactly.

Q. Would the Upper Valley farmers have consented to it on the basis on which it is now being interpreted if they had known it?

A. Yes, sir, they would have accepted it on that statement of Mr. Gust.

Q. Would you have accepted it had you known it was to be interpreted as Mr. Firth is now interpreting it? [175]

A. I wouldn't have never signed it if I thought it was that way.

(Testimony of William Ellsworth.)

Q. Your consent to it was based on the idea that Mr. Gust expressed in his letter, is that it?

A. Yes, sir.

(Mr. Ellsworth excused).'

Mr. Thompson: May it please the Court, in the questions that were propounded to Mr. Gust, reference is made to a certain letter addressed by Mr. Finney, the solicitor to the Secretary of the Interior in connection with the San Carlos Reclamation Project and the pending water adjudication suit, dated December 13th, 1930, to which Mr. Gust made answer in this proffer that we just made and it was referred to in the proffer as Exhibit No. 2. We would like, therefore, to have this document here marked as Petitioners' Exhibit Number 2 for Identification and have the record show that this is a copy of the letter about which Mr. Gust was answering and referring to in our proffer of proof, and it is now marked as Exhibit 2. And further, it is our understanding that counsel will not—they are retaining, of course, all of their objections, but they make no objection to this specifically on the ground that it is a copy.

Mr. Flynn: We make no objection to it as a copy, but do object to it on the grounds set forth in our objection to any testimony being offered at this time.

The Court: Very well. [176]

Following is a copy of

PETITIONERS' EXHIBIT No. 2

for Identification:

“United States of America
Department of the Interior
Washington, D. C.

August 17, 1939.

Pursuant to Title 28, Paragraph 661, United States Code, I hereby certify that the annexed is a true copy of the original as it appears on the records and files of this Department.

In witness whereof, I have hereunto subscribed my name, and caused the seal of the Secretary of the Interior to be affixed, the day and year first above written.

(Seal) (Sgd) OMAR L. CHAPMAN,
Assistant Secretary of the Interior.
United States of America
Department of the Interior
Office of the Solicitor

December 13, 1930.

In re: San Carlos Reclamation Project—
Pending water adjudication suit.

The Honorable

The Secretary of the Interior.

My dear Mr. Secretary:

After preliminary conferences, meetings were held in the Solicitor's office, December 12 and 13, and due to the evident desire of all to reach a fair

and equitable settlement of the matter, avoiding further litigation, a tentative suggestion or plan has been formulated:

1. The water-users in the Safford and other irrigation [177] districts in Arizona and New Mexico above the San Carlos Dam should be protected in so far as their lands placed under irrigation and agricultural use prior to the date of the San Carlos Act of 1924 or such other date as may be agreed upon, are concerned.

2. That the legal difficulties surrounding the situation, involving a stipulation and consent decree by the Court, may be worked out but will involve some further consideration by attorneys and engineers in Arizona.

3. That tentative plan considered at our conferences shall form the basis for a definite form of stipulation to be so worked out and submitted as soon as possible to yourself and to the Attorney General.

4. That if at some future time storage on the Upper Gila should become feasible for the benefits of the lands in the districts on the Upper Gila, no objection will be interposed, but on the contrary the Department will be favorable to such storage being provided by said water-users and the resultant utilization of the water, provided such storage and such utilization of water shall not interfere with the present proposed arrangements or with the rights of the San Carlos Project water-users.

Briefly, the tentative plan is to prepare and incorporate in a decree to be entered in the pending

law suit, a provision to the effect that the prior rights of the Pima Indians and of white settlers under the San Carlos Project, shall attach to and be first satisfied out of the flood water stored [178] in the reservoir; that unless and until the storage is provided on the upper river, the irrigation districts around Safford shall be entitled to continue the diversion and use of waters from the flow of the Gila to the extent that such use was being enjoyed in 1924 when the San Carlos Dam was authorized by Congress, or such other date as may be agreed upon; all of this to be subject, however, to the condition that if in any year there is not sufficient water in the Coolidge Reservoir to satisfy the priorities of the Indians and white lands having priorities in the San Carlos Project, the priorities of the Indians and of such white lands shall be entitled to be satisfied out of the natural flow of the river Gila.

We hope that this solution will avoid the necessity for further litigation in the pending suit and that it will result in preserving the equities of the Upper districts; that the Pima Indians will always have a prior right and also that there will be sufficient water for the irrigation and cultivation of the lands under the San Carlos Project, as now constituted.

(Sgd) E. C. FINNEY

Solicitor

Approved:

(Sgd) ROY LYMAN WILBUR,

Secretary." [179]

Mr. Thompson: If the Court please, there is, in one of the questions asked Mr. Gust and about which he made answer, reference to a letter addressed to Mr. William Ellsworth, President of the Gila Valley Irrigation District, Safford, Arizona, signed by Mr. Gust, dated February 17th, 1935, and in this proffer it is referred to as Exhibit No. 4, and we would now like just to proffer this document as Petitioners' Exhibit Number 4 for Identification, being the same instrument, or copy of the instrument referred to in Mr. Gust's statement.

The Court: I suppose the same objections?

Mr. Flynn: The same objections, and, of course—May I see that?

Mr. Thompson: Yes. (Handing document to counsel).

Mr. Flynn: We would like to have the further objection to this, your Honor, that it is apparent from its date that it is a blanket opinion by Mr. Gust subsequent to the entry of the decree, and I think it is subject to the further objection that it is self-serving in that it is an opinion by one of the attorneys who is a party to the decree.

Mr. Bilby: You don't object to that on the grounds it is a copy?

Mr. Flynn: No.

Following is a copy of

PETITIONERS' EXHIBIT FOR IDENTIFICATION
NUMBER 4 [180]

“Copy

Kibbey, Bennett, Gust, Smith & Rosenfeld
Phoenix, Arizona

February 17, 1935.

Mr. William Ellsworth, President,
Gila Valley Irrigation District,
Safford, Arizona.

Dear Mr. Ellsworth:

I am in receipt of a letter from Mr. J. M. Wilson, submitting three questions of Mr. Firth, Water Commissioner, with reference to additional apportionments of water under Section 2 of Article VIII, page 106, of the Decree entered in the case of United States of America vs. Gila Valley Irrigation District, et al. The language to be interpreted is the following:

“That if and when at any time, or from time to time in any year, water shall flow into said reservoir after said date of first apportionment and shall be stored there and become added to the available storage water in said reservoir, the said Commissioner shall make further and additional apportionments to said defendants of the natural flow of said stream as the same is available at the diversion points of said defendants, which said apportionments shall in turn

correspond with and be equivalent in quantity to the amount of such accessions or newly available stored water supply; that in calculating apportionments of the stored water supply the Water Commissioner shall make appropriate deductions for losses for evaporation, seepage or otherwise that may be suffered between the time of the apportionment and that of the diversion of a corresponding quantity of water from the stream; that such apportionments, corresponding with the net accessions during each annual period after first apportionment, shall be made by said Water Commissioner at least as frequently as once per calendar month, (provided accessions to stored supply have occurred during that period) and at such more frequent intervals as the conditions in his judgment may demand—his decisions in these regards to be subject to summary review by the Court as provided in Article XII hereof.” [181]

It is apparent from the above quotation from the Decree that water included in such additional apportionment must meet three requirements, which are the following: First, the water must flow into the reservoir after the date of the last apportionment; Second, the water must be stored in the reservoir, and, Third, the water must become added to the available stored water in the reservoir.

It is, of course, apparent that all water flowing past the *guaging* stations at Calva and Peridot flows into the reservoir, and so meets requirement 1. It is also apparent that water flowing past the *guaging* stations at Calva and Peridot is stored in the reservoir. No particular time is required for storage. It is not possible to conduct water through the reservoir without the same becoming stored in the reservoir. It is, of course, possible to let out of the gates from the reservoir a quantity of water equal to the quantity that flows in, but this results in the water that is let out being deducted from the stored supply and the new water that flows in becoming stored water. Thus, all water that flows past the *guaging* stations at Calva and Peridot is stored in the reservoir.

The third requirement, however, is that to be considered as an apportionment, the water that flows into the reservoir must be 'added to the available stored water in said reservoir'. This requirement was inserted for the express purpose of eliminating from the apportioned water that was supplied from the reservoir to appropriators before the reservoir [182] who retained their rights in and to the natural flow of the stream. The natural flow of the stream into the reservoir cannot be conducted as such through water in the reservoir and delivered to the landowners below the reservoir to supply their rights of appropriation, but an equivalent amount of stored water in the reservoir can be let out as water flows into the reservoir from above,

and thus the prior appropriations of the landowners below the reservoir is supplied. Water flowing into the reservoir and becoming stored there when an equivalent amount of water was let out at the same time for the use of landowners not entitled to share in the stored supply, cannot be said to be added to the available stored supply.

Turning to the Decree, we find four appropriators for whom provision is made in the Decree for water delivery from the natural flow of the river:

Section 3, page 109, Kennecott Copper Company;

Also, Section 5, Page 110, Kennecott Copper Company;

Also, Section 1, Page 111, Joseph J. Anderson, Grady L. Herring and T. H. S. Glasspie.

Another possibility is that there may be prior rights of landowners not mentioned in the Decree, who were not in the San Carlos Project, for under Section 5, page 105, of the Decree, such landowners are entitled to water to supply their prior appropriations, if there are any such.

The above are all the deductions that we can find authorized to be made from the water flowing into the reservoir, except the allowance for evaporation and seepage. [183]

The question may be asked, why not deduct water permitted to flow out of the reservoir to supply lands, either white or Indian, that are included in the prior appropriations awarded the plaintiff:

The reason is that the Decree provides that these rights shall be supplied, not from the natural flow of the river in accordance with priorities, but from the total supply available on an equality with other lands in said white and Indian projects, regardless of prior appropriations. The Decree does not contemplate that any water be furnished to the white or Indian lands represented by plaintiff in the Decree from the natural flow of the river, but contemplates the supply of all lands in said white and Indian projects from the stored supply. See Section 5, page 107, and Article VI, page 105 of the Decree.

If it is contended that only the increase in the amount of stored water should be taken into consideration in the additional apportionment, we wish to say that if such had been the intention in framing the Decree, it would have been expressly stated that the Water Commissioner should make an additional apportionment of the additional amount in the reservoir found therein at the time of making the additional apportionment. If that had been the intention, the decree would have simply said that the Water Commissioner should measure the quantity of water in the reservoir at the time for each apportionment and make an additional apportionment of the increase in the reservoir over the amount that was therein at [184] the time of the last previous apportionment. That the interpretation we are making is the correct one is strongly indicated by the use of the word, 'accessions', which

appears in the next to the last line on page 106 of the Decree. An accession is something added to a supply, and is not susceptible of being interpreted as an increase. In other words, whatever is added is an accession, notwithstanding that at the same time there may be a depreciation from the total supply.

Under our interpretation as given above, the answer to Question 1, propounded by the Water Commissioner is 'No'. The answer to Question No. 2, propounded by the Water Commissioner, is 'No'. The answer to Question 3, propounded by the Water Commissioner, is 'No'.

The true rule to be followed is: Add to the water passing the *guaging* station at Calva since the last apportionment, the water passing the *guaging* station at Peridot since the last apportionment; deduct all water diverted by Kennecott Copper Company from the river in pursuance of the Decree since the last apportionment, all water diverted by Joseph J. Anderson, Grady L. Herring and T. H. S. Glasspie, in pursuance of the Decree since the last apportionment, and all water, if any, allowed to flow from the reservoir since the last apportionment to supply rights of appropriation not provided for in the Decree, and the amount thus arrived at will be the proper amount of the additional apportionment. [185] To illustrate:

Let A equal the water passing *guaging* station at Calva since last apportionment;

Let B equal water passing *guaging* station at Peridot since last apportionment;

Let C equal water used by Kennecott Copper Company from river in *pursuant* of the Decree since last apportioned;

Let D equal water used by Anderson from river in pursuance of the Decree since last apportionment;

Let E equal water used by Herring from river in pursuance of the Decree since last apportionment;

Let F equal water used by Glasspie from river in pursuance of the Decree since last apportionment;

Let G equal water, if any, allowed to flow out of river to supply prior appropriations not provided for in the Decree;

Then A plus B, minus C, minus D, minus E, minus F, minus G, equals the additional apportionment which may be represented by H.

It occurs to us that when the amount of the additional apportionment is thus determined, it will be advisable to arrive at a revised total of the amount of substituted storage available for the Upper Valleys, as of the date of such apportionment. This may be arrived at as follows:

Let I equal the last apportionment;

Let J equal the substituted storage water used by Upper Valleys since last apportionment;

Let K equal allowance for evaporation since last apportionment;

Then, I minus J, minus K, plus H, equals L, being the amount of substituted storage available at the date of the last apportionment, [186] of which proper publication should be made, as well as of the item K above indicated.

Very truly yours,

KIBBEY, BENNETT, GUST,
SMITH & ROSENFELD,

(Sgd) J. L. GUST

g.b

copy

CR''

Mr. Thompson: If the Court please, in our petition there is an allegation that this interpretation we are asking for, as compared to the interpretation made by the Commissioner, which results in a loss to us of a substantial quantity of water per year, I think it is approximately one acre foot per year, and at this informal hearing we had, a statement was presented by Mr. Firth, the Water Commissioner, showing a computation of the additional amount of water we would have received in the year 1938 had the Decree been administered under the interpretation we contend for rather than the manner in which the Commissioner was interpreting it. This computation was made in writing and submitted at that hearing, and referred to there as Exhibit No. 1. We would like to offer this with the avowal, that if the witness Firth, the Water

Commissioner, were called and examined on that subject that he would swear the figures setting up this computation were made by him and showed, in his opinion, the approximate difference in the amount of water that would be obtained under the two interpretations. We are doing [187] this not only to support the allegations of our petition but to show that this is not a moot question, that the results are substantial. We want to offer this with the avowal that the Commissioner will state that he made it and that those figures are his figures. This would be Petitioners' Exhibit Number 5. This was also offered at that hearing and marked.

Mr. Flynn: I think you better state in the record what it consists of.

Mr. Bilby: There are two sheets of the exhibit. The first sheet is an excerpt from the opinion or letter written by Mr. Gust, being Petitioners' Number 4, was it not?—and contains a copy of the formula for computation set forth by Mr. Gust in that opinion; the second sheet of the exhibit is a computation of the Water Commissioner, Mr. Firth, showing the additional amount of water that would result to the Upper Valley users through the use of this formula. That would be Petitioners' Exhibit 5.

Mr. Flynn: And the record will show our objection to it on the grounds heretofore stated.

The Court: Very well.

Copy of

PETITIONERS' EXHIBIT NUMBER 5
FOR IDENTIFICATION:

“METHOD OF MAKING AN APPORTIONMENT TO THE ‘UPPER VALLEY’ AS SET OUT IN THE OPINION OF JOHN L. GUST:

The true rule to be followed is: Add to the water passing the gaging station at Calva since the last apportionment, the water passing the gaging station at Peridot since the last apportionment. Deduct all water diverted by Kennecott Copper Company from the river in pursuance of the [188] Decree since the last apportionment, all water diverted by Joseph J. Anderson, Grady L. Herring and T. H. S. Glasspie in pursuance of the Decree since the last apportionment, and all water, if any, allowed to flow from the reservoir since the last apportionment to supply rights of appropriation not provided for in the Decree, and the amount thus arrived at will be the proper amount of the additional apportionment.

To illustrate—

Let A equal the water passing gaging station at Calva since last apportionment;

Let B equal water passing gaging station at Peridot since last apportionment;

Let C equal water used by Kennecott Copper Company from river in pursuance of the Decree since last apportionment;

Let D equal water used by Anderson from river in pursuance of the Decree since last apportionment;

Let E equal water used by Herring from river in pursuance of the Decree since last apportionment;

Let F equal water used by Glasspie from river in pursuance of the Decree since last apportionment;

Let G equal water, if any, allowed to flow out of river to supply prior appropriations **not** provided for in the Decree;

Then A plus B, minus C, minus D, minus E, minus F, minus G, equals the additional apportionment which may be represented by H.

It occurs to us that when the amount of the additional apportionment is thus determined, it will be advisable to arrive at a revised total of the amount of substituted storage available for the Upper Valleys, as of the date of such apportionment. This may be arrived at as follows:

Let I equal the last apportionment;

Let J equal the substituted storage water used by Upper Valleys since last apportionment;

Let K equal allowance for evaporation since last apportionment; [189]

Then I minus J, minus K, plus H, equals L, being the amount of substituted storage available at the date of the last apportionment,

of which proper publication should be made as well as of the Item K above indicated.

Using Mr. Gust's method and applying the values for the year 1938 up to October 1, we have:

A =	84,210	acre feet
B =	15,030	acre feet
C =	2,252	acre feet
D =	406	acre feet
E =	0	acre feet
F =	0	acre feet
G =	0	acre feet

$$A + B - C - D - E - F - G = H$$

$$(84210) + (15030) - (2252) - (406) - (0) - (0) - (0) = (96582)$$

$$I = 54,250 \text{ (available stored water 1-1-39)}$$

$$J = 0$$

$$K = 13,607 \text{ acre feet}$$

$$- J - K + H = L$$

$$(54250) - (0) - (13067) + (96582) = 137,225 \text{ acre feet}$$

which would be the amount of water apportioned to the Upper Valleys by this method. This would amount to an apportionment of 3.38211 acre feet per acre.

By the method of the Water Commissioner, there has been apportioned to the Upper Valleys up to October 1, 1938, an amount of 102,437 acre feet which amounts to 2.52474 acre feet per acre.

The difference of these two methods would be 34,788 acre feet which amounts to 0.85737 acre feet per acre." [190]

Mr. Bilby: Now, if your Honor please, we have one other witness whom we feel it is essential to call, because he is a representative of and the only testimony we would have to offer on this question from the Upper District, from the district beyond Duncan there. We want to call Mr. Frank McGrath, and ask him some questions, and obtain some answers under the same conditions of offer of proof and we will make them as short as possible.

Mr. Flynn: Cannot you make a statement of what his testimony would be?

Mr. Bilby: I think it would be quicker the other way.

The Court: You want to offer the testimony of the witness on the stand instead of letting the record show what his testimony, if presented, what his testimony would be?

Mr. Bilby: Yes, your Honor, because we have no statement of his testimony like we do of the others; if we had it in that form, I might inform the Court that it would be substantially the same as the testimony of these other witnesses, with certain exceptions. Of course, he is situated different from Mr. Gust, he is not an attorney, he is a land-owner in the Upper District, and he is not from the same district as Mr. Ellsworth and Mr. Wilson, but his testimony with reference to the intent of the parties with regard to this question would be substantially the [191] same as the other witnesses.

The Court: You are familiar with what the witness would testify to if permitted to testify, so that

you will be able to make a statement of what the testimony would be?

Mr. Bilby: I believe I could.

The Court: That would be in keeping with the other proffers.

Mr. Bilby: Very well, your Honor. We also offer to prove that if the witness, Frank McGrath, who is present and available and could be called if your Honor would permit, if he were called and sworn as a witness and permitted to testify, that in response to questions he would swear that his name is Frank McGrath, that he is a resident of Greenlee County at Franklin, Arizona, and is a landowner in the Franklin Irrigation District; that during the period of time while this decree was being drafted and discussed and while the litigation was pending over priorities between the parties and testimony was being taken before the Master appointed by the Court, bearing upon the subject of priorities, that he was Secretary of the Franklin Irrigation District and, I believe, a member of the Board of Directors of that District; that he represented his District in the sense that he appeared on their behalf at most of the conferences that were held during that period of years, beginning back, I should say, in 1930, perhaps up to the date of the decree in 1935; that at these conferences that he participated in the discussions [192] that were had and understood what was said by the various parties; that at those conferences government representatives were present, consisting of Mr. Trues-

dale, Mr. Smith and others, Mr. Walthen, Mr. Southworth and various other government representatives who participated in this matter; that when the question of substituted storage came up, there was considerable discussion as to the manner of putting the substituted storage plan into effect, and various plans were suggested; that during these conferences that the government representatives, particularly Mr. Truesdale, contended for a plan similar to the method now practiced by the Commissioner; that that plan was objected to by Mr. McGrath and the people he represented, and that before the decree was finally signed and before he and the land owners and water users of his district would consent to it being signed, it was their understanding and they were assured by their own attorneys and by the attorneys and representatives of the government that the interpretation now contended for by the petitioners was what the decree meant, and the manner in which the decree would be interpreted; that is to say, that all waters running into the lake made by the dam, except such waters as were taken by persons not parties to the decree, by the Kennecott Copper Company and Anderson and others, that all waters except those, running into the reservoir, were to be considered as stored waters and taken into account in making apportionments to the Upper Valley users; that it was upon this basis and no other that he, on behalf of the people he represented, and [193] the other people in that district consented to the decree being

signed in the form in which it was signed; that Mr. A. R. Lynch was the attorney representing that district and worked in connection with and in cooperation with Mr. Gust, who represented the Gila Valley District; that he and his people in that district were advised by their attorney, Mr. Lynch, and also advised by Mr. Gust, prior to consenting that this decree might be signed on their behalf, that the decree did mean that all waters running into the reservoir, save and except those I have mentioned as being excepted, were to be considered as stored waters and taken into account in making the apportionment; that in such apportionment all waters running into the reservoir save and except those heretofore stated, Glasspie, Herring, Kennecott Copper Company and Anderson, would be taken into account and apportionment would be made of an equivalent amount; he would further testify that most of the negotiations regarding the matter of substituted storage, arose after the receipt of the letter signed by the solicitor of the Department of the Interior and approved by the Secretary of the Interior, dated December 13, 1930, and offered by the Petitioners as Exhibit Number 2; he would testify that after receipt of that letter the parties to the negotiations understood and agreed that the Upper Valley users were to be left in substantially the same condition as they were before the San Carlos Act, that is, that they would be permitted to use the water in the [194] same manner as theretofore they had used it, and the discussion

was concerning the means of putting that understanding and agreement into effect; that after the receipt of the letter of December 13th, 1930, all parties agreed that in accordance with the direction of the Secretary the Upper Valley users were to be permitted to use the waters as they had theretofore used it; that it was his understanding and agreement, in so far as he agreed, that that object would be accomplished through taking into account and considering as stored water all water running into the reservoir save and except the amount which I have heretofore stated as excepted.

Mr. Flynn: I think, as to this offer, we would like the additional objection that it largely consists of opinions and conclusions of the witness, in addition to those other objections which have been made to the offer of any testimony.

The Court: Well, the objections to the proffer of testimony will be sustained.

Mr. Thompson: I suppose, your Honor, upon the ground that the Court does not find the decree ambiguous?

The Court: As indicated in the interpretation.

Mr. Thompson: May it please the Court, as I recall the record, I think I am correct, the Court's instruction in this matter is dated November 13th, 1939, which means, of course, that the ninety days for appeal in this matter will very shortly expire. What we would like to ask the Court to [195] do and indulge us in, would be to vacate the instruc-

tion heretofore made and enter the same instruction as of this date. We cannot see that any one's rights would be prejudiced thereby, and it would permit us to take a reasonable time in the matter of the appeal; we realize the fact that we have been somewhat slow, but the holidays have intervened and we have had a number of matters to consider for our clients, but they have determined to appeal and would like the indulgence of the Court, if it is in order.

The Court: The only situation in regard to that is this: the ruling in the petition for review of the action of the Water Commissioner is yet to be made; the interpretation was an incidental inquiry into the questions raised by the petition and now, when a ruling, when this petition is finally disposed of, if it is adverse to the petitioners, their appeal would be available to them without regard to disturbing this incidental instruction which was raised by the inquiry into the petition.

Mr. Thompson: I didn't know how the Court would consider it, whether he would consider this instruction was incidental, but we had thought that under the petition there would probably be some supplemental order; but of course, if that is the Court's understanding, then we are incorrect, and I don't see that there would be any purpose in it.

The Court: Do counsel for the Government want to [196] be heard on what the Court has indicated its position is, so far as concerning what action should be taken at this time?

Mr. Flynn: I think, of course, if the counsel for the Petitioners are interested in their record, it appears to me that the Court may enter an order now upon that petition, that that might be done.

Mr. Bilby: As I understand, when the Court is ready to rule on our petition, which has not been ruled upon yet, your Honor will make an order at that time, and that would be the order from which we would appeal; the instructions heretofore made are not a ruling on our petition.

The Court: The Court merely announced a ruling or instruction that it had found and announced in an instruction on the decree, because the question is whether the Water Commissioner has been properly administering the water under the decree.

Mr. Bilby: And the final ruling on the petition will be made after the proffer of this evidence and will be in the nature of an order instructing the Commissioner, I take it.

The Court: Yes. Is there any further testimony to be admitted under your proffer?

Mr. Bilby: No, your Honor.

The Court: Well, do counsel desire to be heard now any further in reference to this testimony that has been offered at this time, or to offer any further testimony? [197]

Mr. Flynn: Of course, your Honor, I don't want to offer any testimony if the Court has ruled on their offer, and of course, if their testimony would be admitted, then we would want consideration from the Court; naturally, we would want to meet that

testimony if it would be entered and taken into consideration by the Court in determining this decree, but if the ruling is that this offer is denied, then, of course, we don't want to offer any.

The Court: I don't understand.

Mr. Flynn: I say, if the offer of this proof is denied, then we are content to rest with that; if that evidence were to be admitted and taken into consideration by the Court, naturally we would want to meet it. The Court has already ruled?

The Court: Yes. Is there anything, without the necessity of the Court going through some of the matters that have been offered here, in the way of a tender, are there any other matters for the Court's consideration except the matter of the Court's ruling on the instruction and matters of that character offered by the petitioners, that the Court should examine, other than the matters on which the ruling of the Court has already been passed?

[198]

Mr. Thompson: Of course, your Honor, I take it that the Court has already considered the briefs of counsel. Our position is that the decree means what we have contended it meant all the way along and that, if it doesn't mean that, certainly no one could say that it clearly means what the Government contends it means, and therefore, under the rule, would be ambiguous and we would be entitled to a submission of testimony on the issues of what was intended by the Petitioners. We have always felt that, and feel, that after the reading of it by the

Court, that in fairness to all of us, it was impossible to say that it clearly does not mean what we contend it means and clearly means what the Government contends it means, and that is our position.

Mr. Bilby: And that is what this testimony is offered for, to bear upon that question of what it did mean and clarify what it did mean.

The Court: I have noted the prayer in the petition of the Petitioners, and the question occurs to the Court as to the form of order that the Court shall enter. The Court has already heard the respective parties on this petition, and the question in the Court's mind is as to the form of the order in denying the relief asked for in the petition, and that will be the form of the order, Gentlemen, and the ruling asked for in the petition will be denied.

Mr. Thompson: May it please the Court, I am just creeping along here myself and am not sure just what the procedure is, and I would call your Honor's attention to page 112, paragraph 12, of the original Decree, for that was the provision under which this petition was filed. Wouldn't it of necessity, in any order made by the Court, wouldn't he have to make the order in the nature of a finding [199] that what the Commissioner is now doing is proper and therefore denying the relief asked for?

The Court: It may be that, but I think this question of whether the administration is being conducted in a proper manner under the decree seems to be of an informal nature and may be raised and inquiry made into what the Water Commissioner

has done; of course, the record has proceeded to that point where that is shown, and the order should be confirming the action of the Water Commissioner.

Mr. Thompson: If we are entitled to appeal, we would like to have the matter squarely considered by the Circuit Court, and it seems to me that we raise an issue here as to whether the Commissioner is proceeding properly, and if the Court finds that he is proceeding properly and denies us any relief, then it would be clear what the issue is and what our assignment of error would be, that is very clear, whereas, if the Court merely denies the relief it might be based on any other number of reasons, and with the Court's findings we feel it doesn't present the position properly and we would like to have our record to that extent.

The Court: Do you want to be heard on that form of the order?

Mr. Flynn: We are satisfied with the order announced by the Court, but I think from the Petitioners' standpoint, that the instructions, which are a part of this case and given by the Court, probably would answer the purpose they are talking about.

[200]

Mr. Bilby: If the Court please, the Court has announced its decision, and why not permit counsel time to get together on the proper kind of an order, and present it to the Court?

The Court: Very well, you may do so and present it to the Court at two o'clock. If there is noth-

ing further to be heard now, the Court will re-convene at two o'clock. [201]

State of Arizona,
County of Pima—ss.

I, Gertrude E. Mason, do hereby certify, that I am deputy to the official reporter of the United States District Court at Tucson, Arizona; that as such deputy court reporter I was present at the hearing in the above entitled matter before the Hon. Albert M. Sames, Judge of the District Court aforesaid, and took down in shorthand notes the proceedings at said hearing, including all proffers of proof and avowals by counsel, all objections, rulings and arguments before the Court; that I have transcribed my shorthand notes into typewriting, the foregoing, on seventy-seven pages, being a full, true and correct transcript thereof, to the best of my skill and ability.

Witness my hand this 1st day of March, 1940.

GERTRUDE E. MASON,

Deputy Court Reporter.

[Endorsed]: Filed April 15, 1940. [202]

[Endorsed]: No. 9527. United States Circuit Court of Appeals for the Ninth Circuit. Gila Valley Irrigation District, Franklin Irrigation District, Roy A. Layton, Milton Lines, William Waldrom, Roy D. Williams, and J. D. Wilkins, Appellants, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Arizona.

Filed May 22, 1940.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
in and for the Ninth Circuit

No. 9527

GILA VALLEY IRRIGATION DISTRICT,
et al.,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS

Pursuant to paragraph 6 of Rule 19 of the Rules of the United States Circuit Court of Appeals for the Ninth Circuit, the appellants, by their attorneys,

hereby state the points on which they intend to rely on the appeal of the above entitled matter, to-wit:

1. That the United States District Court for the District of Arizona erred in rendering its certain "Order on Petition to Review Action", dated January 22, 1940, holding that the provisions of the Decree of June 29, 1935, directed the Water Commissioner to make apportionments to the upper valley users in the manner set forth in said Order, and confirming the actions of said Water Commissioner in apportioning the water described therein in the manner set forth in said Order.

2. That the United States District Court for the District of Arizona erred in rendering its certain "Order on Petition to Review Action of Water Commissioner", dated January 22, 1940, holding that the provisions of the Decree of June 29, 1935 relating to "stored water" are clear and unambiguous.

3. That the United States District Court for the District of Arizona erred in sustaining appellee's objections to the introduction of proof by appellants to show the true intent and meaning of the Decree of June 29, 1935, relating to the apportionment of water to upper valley users.

KNAPP, BOYLE & THOMPSON

B. G. THOMPSON

ARTHUR HENDERSON

RALPH W. BILBY

T. K. SHOENHAIR

Attorneys for Appellants

Copy recd. this 18th day of May, 1940.

F. E. FLYNN

U. S. Attorney S

[Endorsed]: Filed May 22, 1940. Paul P. O'Brien,
Clerk.

[Title of Circuit Court of Appeals and Cause.

DESIGNATION OF PRINTED RECORD

Pursuant to the provisions of Paragraphs 6 of Rule 19 of the Rules of the United States Circuit Court of Appeals for the Ninth Circuit, Appellants hereby designate the following portions of the transcript of record as the printed record in the above entitled appeal, to-wit:

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2. Answer of Plaintiff to Petition.....	211
3. Answer of Water Commissioner to Petition	214
4. Minute Entry of September 25, 1939 allowing adoption of Water Commis- sioner's Answer by United States.....	222
5. Order on Petition.....	227
6. Transcript of Evidence.....	125
7. Stipulation concerning contents of record on appeal.....	235

Dated May 20, 1940.

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F. E. FLYNN

U. S. Attorney S

[Endorsed]: Filed May 22, 1940. Paul P. O'Brien,
Clerk.

[Title of Circuit Court of Appeals and Cause.]

STIPULATION

It is herein and hereby stipulated by and between counsel for Appellants and Appellee, that in making up the designation of parts of contents of record on appeal and record on appeal the Clerk of the United States District Court, for the District of Arizona, shall certify a copy of the decree entered herein June 29, 1935, including the stipulation for consent to the entry of said decree, as printed by the United States Government Printing Office in 1935 (as shown on the last page thereof), along with the record.

It is further stipulated that the Appellants herein shall furnish to the Clerk of the United States District Court a copy of said printed decree and stipulation, to be certified by said Clerk, and will also furnish to said Clerk four other copies of said decree and stipulation, which need not be certified.

It is further stipulated that the said printed decree and stipulation shall not be printed as a part of the record in this case, but that said decree and stipulation may be considered by the Court as a part of the record in this case for the purpose of appeal, and all the parts of said decree and stipulation which shall be referred to in the briefs shall be published in the appendix to such briefs.

Dated May 20, 1940.

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So ordered.

CURTIS D. WILBUR

Senior United States Circuit Judge

[Endorsed]: Filed May 27, 1940. Paul P. O'Brien,
Clerk.

2

In the
United States
Circuit Court of Appeals
For the Ninth Circuit

GILA VALLEY IRRIGATION DISTRICT, FRANKLIN IRRIGATION DISTRICT, ROY A. LAYTON, MILTON LINES, WILLIAM WALDRON, ROY D. WILLIAMS, and J. D. WILKINS,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Brief for Appellants

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FILED

JUL 11 1940

J. P. O'BRIEN,
CLERK

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In the
United States
Circuit Court of Appeals
For the Ninth Circuit

GILA VALLEY IRRIGATION DISTRICT, FRANKLIN IRRIGATION DISTRICT, ROY A. LAYTON, MILTON LINES, WILLIAM WALDRON, ROY D. WILLIAMS, and J. D. WILKINS,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

No. 9527

Brief for Appellants

STATEMENT OF PLEADINGS AND FACTS

This case arises over the distribution and use of the waters of the Gila River. The Gila River rises in southwestern New Mexico and flows in a westerly direction through the State of Arizona, and empties into the Colorado River at Yuma, Arizona. Beginning at the head of the river, the principal lands in

irrigation lie within: The Virden Irrigation District is in the State of New Mexico at the point where the Gila River enters the State of Arizona; the Franklin Irrigation District embraces the lands in the State of Arizona in Greenlee County, Arizona, bordering on the river immediately after it enters the State of Arizona; the Gila Valley Irrigation District embraces the lands on each side of the Gila River in Graham County, Arizona, approximately forty miles west of the Franklin Irrigation District; the lands embraced within the San Carlos Project, including the Indian lands and the lands of white settlers embraced within the San Carlos Irrigation District, are located in Pinal County, Arizona, beginning below and approximately thirty miles west of the Coolidge Dam.

The San Carlos Dam and Reservoir is located on the Gila River within the San Carlos Indian Reservation and is between the lands embraced in the Virden, Franklin and Gila Valley Irrigation Districts on the east and the lands embraced within the San Carlos Project on the west.

The controversy is between the water users of the Franklin and Gila Valley Irrigation Districts on the one hand and the water users of the San Carlos Project, including the Indian lands, on the other. For the sake of convenience throughout our brief, we will refer to the petitioners in this case and the water users in the Franklin and Gila Valley Irrigation Districts as the "Upper Valley Users," and will refer to the govern-

ment and water users in the San Carlos Project as "plaintiff" or "Lower Valley Users."

The original action out of which the present controversy arose was instituted in the United States District Court for the District of Arizona, being cause No. Globe Equity 59. That action was instituted on the 3rd day of October, 1925, by the United States of America, as plaintiff, and against all water users within the districts named and others using water from the Gila River, as defendants, for the purpose of adjudicating the respective priorities between the Indians and the other users of water on the river. The suit was brought by the United States under the provisions of Section 41, Title 28, United States Code, for itself and as trustee and guardian for the Pima and Apache Indians, occupants and possessors of land with alleged water rights appertaining thereto in the Gila River Reservation and the San Carlos Reservation, and was instituted at the suggestion of the Secretary of the Interior and by direction and authority of the Attorney General. The suit was concluded on the 29th day of June, 1935, by the entry of a consent decree. (Tr., Vol. II.)

The decree, as entered, contains the following provision (Art. XII, page 112, Tr., Vol. II):

"that any person, feeling aggrieved by any action or order of the Water Commissioner, in writing and under oath, may complain to the Court, after service of a copy of such complaint on the Water Commissioner, and the Court shall promptly re-

view such action or order and make such order as may be proper in the premises.”

and the further provision (Art. XII, page 113, Tr., Vol. II):

“that the Court retains jurisdiction hereof for the limited purposes above described, this decree otherwise being a final determination of the issues of this cause and of the rights herein defined.”

The question involved in this appeal arises by reason of a petition filed with the court on July 5, 1939, in said cause, by appellants, pursuant to the provisions of the decree above quoted, seeking a review of the actions and orders of the Water Commissioner specifically complained of in said petition. (Tr., Vol. I, pp. 2-9.)

The United States, on the 9th day of September, 1939, filed its answer to the petition to review the action and orders of the Water Commissioner. (Tr., Vol. I, pp. 10-12.)

The Water Commissioner also filed, on his own behalf, an answer to the petition. (Tr., Vol. I, pp. 12-24.) This answer was stricken upon order of the court. (Tr., Vol. I, p. 25.) Prior to the hearing on the petition, the answer of the Water Commissioner was adopted by the government. (Tr., Vol. I, p. 25.)

Argument was had upon the issues raised by the petition and answers thereto on September 25, 1939 (Tr., Vol. I, pp. 25-26), and the matter submitted to the court for its interpretation of the meaning of the decree. Thereafter and on January 22, 1940, the court

made and filed its Order on Petition to Review the Action of the Water Commissioner, denying relief to the petitioners. (Tr., Vol. I, pp. 26-29.) It was from this order that this appeal is prosecuted. (Tr., Vol. I, pp. 29-30.)

STATEMENT OF THE CASE

In order to present clearly the contention of appellants, it will be necessary to review briefly the history of the case leading up to the filing of the petition on which this appeal is based.

On June 7, 1924, the United States Congress passed the San Carlos Act, authorizing the construction of the Coolidge Dam. (U. S. Statutes at Large, Vol. 43, p. 475.) Subsequent to the passage of the act, and on October 3, 1925, this original action was instituted by the government, seeking to establish the priority of the rights of the Indians to use waters of the Gila River for the irrigation of their lands. In its complaint, the government contended that the Indians had a prior right, as of time immemorial, to the use of sufficient of the waters of the river to properly irrigate approximately fifty thousand (50,000) acres of land. This contention was disputed by the Upper Valley Users, they asserting in their answers that their rights were prior to any other rights on the river, and that any such rights as the Indians might have established prior to their own had been abandoned by

failure to continuously use any definite quantity of water on any specific portion of the land.

With the matter in this status, the controversy was referred by the court to a master for the purpose of taking testimony in order to ascertain the respective priorities of the parties to the action. Extensive testimony was taken until the latter part of the year 1930, when a conference was held by the Upper Valley Users, the Lower Valley Users, the government officials representing Indians' rights, and Secretary Wilbur of the Department of the Interior. At this conference a plan was agreed upon for settlement of the controversy and reduced to writing and approved by the Secretary. (Tr., Vol. I, pp. 85-87.) It provided for the protection of the Upper Valley Users in the irrigation of their lands which have been put to agricultural use prior to the date of the passage of the San Carlos Act in 1924, and that the Upper Valley Users should be entitled to continue the diversion and use of the waters from the Gila River to the extent that such waters were being used and enjoyed in 1924 when the San Carlos Dam was authorized by Congress.

After the conference with the Secretary of the Interior, a decree, containing a description of all the lands embraced within the various districts and the date of their respective priorities to the use of water, was framed and, by consent of the parties, was signed and entered by the court on June 29, 1935. This decree, among other provisions, contains Article VIII (Tr.,

Vol. II, pp. 106-107), which was inserted for the purpose of protecting the Upper Valley Users and carrying out the provisions of the agreement growing out of the Secretary's conference.

The decree provides for the appointment of a Water Commissioner by the court to carry out and enforce the provisions of the decree and the instructions and orders of the court. (Tr., Vol. II, Art. XII, p. 112.) Shortly after the decree was entered, a Commissioner was appointed and entered upon his duties. Within a very short time after the appointment of the Commissioner, a controversy arose over his manner of apportioning waters to the Upper Valley Users.

The manner of apportioning water by the Commissioner, of which the Upper Valley Users complained, is as follows:

On January 1 of each year the Commissioner determined the amount of water then stored in the San Carlos Reservoir and which was available for release through the gates of Coolidge Dam as of that date, and, after allowing for estimated evaporation and seepage, apportioned to the Upper Valley Users an amount of water equivalent to said available stored water then in the San Carlos Reservoir; that thereafter and from time to time during each year after January 1, in making subsequent apportionments to said Upper Valley Users, the Commissioner took into account and made an apportionment to them of only such additional waters as had flowed into the reservoir and remained

therein, and which had raised the elevation of the water within the reservoir since the date of the last apportionment; and that the Commissioner did not take into account all of the water which had flowed into the reservoir since the date of the last apportionment and which was available for release through the gates of Coolidge Dam, less an amount estimated for evaporation and seepage.

The effect of the Commissioner's construction, as approved by the lower court, was that the amount of water to be apportioned to the Upper Valley Users was dependent upon the manner in which the water ran into the reservoir and the manner in which the plaintiff withdrew it therefrom. If the amount of water running into the reservoir did not exceed the amount of water being withdrawn for the use of the Lower Valley Users, then under this interpretation the Upper Valley Users can obtain no apportionments. The practical operation of this construction was that the Upper Valley Users receive apportionments only from flood waters unless the Lower Valley Users saw fit to permit the water which was available to them to remain in the reservoir and raise the level of the lake.

It was and is the contention of appellants that the Water Commissioner, after making the first apportionment on January 1 of each year, should have apportioned to the Upper Valley Users an amount of water equal to *all* water flowing into the reservoir

since the date of last apportionment and available for release through the gates of Coolidge Dam, less an estimated allowance for evaporation and seepage, and regardless of whether the water flowing into the reservoir during the period since the last apportionment had been withdrawn therefrom or had been permitted to remain in the reservoir and caused the elevation of the water in the reservoir to rise.

The Upper Valley Users, upon learning of the manner in which the Commissioner was making apportionments, immediately protested and requested that apportionments be made to them in accordance with their contention as to the meaning of the decree. At the time of making such protest, an opinion of counsel who had assisted in drafting the decree was obtained and served upon the Commissioner. (Tr., Vol. I, pp. 89-96.) Notwithstanding this protest, the Commissioner continued to apportion the water in the same manner he had theretofore pursued with the result that the Upper Valley Users, feeling aggrieved, filed their petition for review of the Commissioner's actions.

The question involved, therefore, is whether or not the Commissioner is correct when, in making apportionments to the Upper Valley Users subsequent to the apportionment of January 1 of each year, he fails and refuses to take into account *all* water running into the reservoir and available for release through the gates of Coolidge Dam, less an estimated amount for evaporation and seepage.

SPECIFICATION OF ERRORS

1. The District Court erred in rendering its certain "Order on Petition to Review Action of Water Commissioner," dated January 22, 1940, denying petitioners any relief and holding that the provisions of the decree of June 29, 1935, authorized the Water Commissioner to make apportionments of water to the Upper Valley Users, after the first apportionment made on the first day of January of each year, by determining the increments of gain in available stored water of the reservoir since the last apportionment was made and adding thereto net bank storage as measured by bank release, and from this total deducting the evaporation losses from the date of last apportionment to the estimated time for use of the apportioned water, and failing to take into account water withdrawn from the reservoir for use by the Lower Valley Users since the date of last apportionment, because the said decree provides that said Commissioner, in making apportionments of water to said Upper Valley Users, after the first apportionment made on January 1 of each year, shall take into account and make an apportionment equivalent to all of the water running into the reservoir since the date of last apportionment and available for release through the gates of Coolidge Dam, exclusive of an appropriate deduction for estimated evaporation and seepage.

2. That the District Court erred in rendering its certain "Order on Petition to Review Action of Water

Commissioner," dated January 22, 1940, holding that the provisions of the decree of June 29, 1935, relating to "stored water" are clear and unambiguous, because if the said decree does not provide and mean that the said Water Commissioner, in making apportionments to the Upper Valley Users, after the first apportionment made on January 1 of each year, shall take into account as stored water all water running into said reservoir since the date of last apportionment and available for release through the gate of Coolidge Dam, less an appropriate allowance for seepage and evaporation, then the provisions of said decree relating to "stored water" are not clear but are ambiguous.

3. That the District Court erred in sustaining appellee's objections to the introduction of evidence offered by appellants to show the true intent and meaning of the decree of June 29, 1935, relating to the apportionment of water to the Upper Valley Users, after the first apportionment made on January 1 of each year. That the said evidence so offered by appellants consisted of Petitioners' Exhibit No. 2 (Tr., Vol. I, pp. 85-87) and Petitioners' Exhibit No. 4 (Tr., Vol. I, pp. 89-96), and the testimony of the witnesses, John L. Gust (Tr., Vol. I, pp. 37-69), J. M. Wilson (Tr., Vol. I, pp. 70-79), William Ellsworth (Tr., Vol. I, pp. 80-84), and Frank McGrath. (Tr., Vol. I, pp. 102-105.)

That the full substance of Petitioners' Exhibit No. 2 is a letter written to the Secretary of the Interior by the Solicitor of the Department of the Interior, dated December 13, 1930, and approved by the Secretary of

the Interior, which letter sets forth the plan for the compromise and settlement of the litigation by providing that the Upper Valley Users should be entitled to continue the diversion and use of the waters from the Gila River to the same extent that such waters were being enjoyed by said Upper Valley Users in the year 1924 when the San Carlos Dam was authorized by Congress.

That the full substance of the evidence offered through the testimony of said witnesses and by Petitioners' Exhibit No. 4 was to show that the witnesses and each of them participated in the framing of said decree of June 29, 1935, and that Article VIII of said decree was intended and agreed by all parties to mean that in making apportionments to the Upper Valley Users, after the apportionment made on January 1 of each year, the Water Commissioner should take into account and make apportionments to said Upper Valley Users equal to *all* water running into the reservoir since the date of last apportionment and available for release through the gates of Coolidge Dam, after appropriate deductions for seepage and evaporation, in accordance with the plan approved by the Secretary of the Interior as set forth in Petitioners' Exhibit No. 2, and so as to enable said Upper Valley Users to continue the use of water as they had theretofore used the same prior to the passage of the San Carlos Act. The full substance of said testimony further shows that it would be impossible under the manner of apportionment theretofore used by the Water Commissioner and

approved by the court to enable said Upper Valley Users to continue the use of said waters as they had theretofore used them prior to the passage of the San Carlos act.

That the objection urged to said testimony was:

“MR. FLYNN: As I understand it, it is merely an offer, and of course we would like to have the record show our objections to it, on the ground that it is immaterial and irrelevant. Of course, without knowing what it is, I am not familiar with the testimony, and there may be many grounds on which it is objectionable in addition to the fact that it is not admissible for the purpose of varying or determining the judgment and decree of this Court, that is, that the judgment of this Court is clear and plain and therefore any oral testimony or any testimony whatsoever would be inadmissible to explain or change it for the purpose of interpreting the decree. That is our objection. Now, as we say, it might be immaterial for other reasons, but even if the testimony were admissible for that purpose, this testimony probably would be objectionable on the ground it would not help to determine the decree of this Court, which is not ambiguous so we would like to reserve all these objections and exceptions to the offer, and it is my understanding that it is made for the purpose of the record, and we have no objection to it being made in this way. Of course, if admitted in evidence, we would object because we would want an opportunity of cross-examination.” (Tr., Vol. I, pp. 34-35.)

As to the proffered testimony of the witness McGrath, this further objection was made:

“MR. FLYNN: I think, as to this offer, we would like the additional objection that it largely consists of opinions and conclusions of the witness, in addition to those other objections which have been made to the offer of any testimony.” (Tr., Vol. I, p. 105.)

The objections to all proffered testimony were sustained by the court. (Tr., Vol. I, p. 105.)

SUMMARY OF THE ARGUMENT

We have made three Specifications of Error. Summarized, our argument under these Specifications is as follows:

1. Basically, it is our contention that the decree provides that the Water Commissioner shall, in making apportionments to the Upper Valley Users, after the first apportionment made on January 1 of each year, take into account and apportion to said Upper Valley Users an amount of water equal to *all* water running into the reservoir since the date of the last apportionment and available for release through the gates of Coolidge Dam, less an appropriate deduction for evaporation and seepage.

2. That if it be held that the decree does not provide that the Water Commissioner shall make apportionments to the Upper Valley Users, as set forth in the preceding paragraph, then it must be held that the pro-

visions of Article VIII of the decree, relating to stored water and apportionments to the Upper Valley Users, are not clear, but are ambiguous.

3. That if it be held that the decree is not clear and is ambiguous, petitioners were entitled to introduce evidence to clarify the decree and explain its meaning and to show the court the intention of the parties at the time the decree was agreed upon and entered.

We will argue these propositions in the order they are set forth above.

ARGUMENT

SPECIFICATION OF ERROR NO. 1

In order to properly present our position, it is necessary to refer briefly again to the facts leading up to the entry of the decree.

It appears from the decree itself (Tr., Vol. II, p. 15) that some of the Upper Valley Users had been using the waters of the Gila River for the purpose of irrigating their lands from as far back as the year 1872. So far as the record discloses, there had never been any controversy between the Upper Valley Users and the Indians concerning the right to use the water until this original action was instituted. There is nothing to indicate that it had ever before been contended on the part of the Indians that the Upper Valley Users were not entitled to use the waters exactly as they had been using them since the year 1872.

On June 7, 1924, Congress passed the San Carlos Act, authorizing the construction of the Coolidge Dam. Notwithstanding the contention that the government made in this litigation to the effect that the Indians had appropriated and had a prior right to the use of water from the river for the irrigation of approximately fifty thousand (50,000) acres of land, it was recognized by Congress in the Act itself that the Indians were then without an adequate supply of water. The first paragraph of the Act provides:

“That the Secretary of the Interior, through the Indian Service, is hereby authorized to construct a dam across the canyon of the Gila River near San Carlos, Arizona, as a part of the San Carlos Irrigation project . . . for the purpose, *first*, of providing water for the irrigation of lands allotted to Pima Indians on the Gila River Reservation, Arizona, *now without an adequate supply of water* and, *second*, for the irrigation of such other lands in public or private ownership, as in the opinion of the Secretary, can be served *with water impounded by said dam* without diminishing the supply necessary for said Indian lands.” (Italics ours.)

United States Statutes at Large, Vol. 43, page 475—June 7, 1924.

It seems plain from this statement that Congress recognized that the Upper Valley Users had made a lawful appropriation of the waters of the river and that the Indians therefore had no “adequate supply” for their lands and that it was the purpose and intent

of Congress, in passing the Act, to provide a supply of water for the Indians by impounding flood waters. There is certainly nothing in the Act that would indicate that Congress intended to interfere with the old and well-established rights of the Upper Valley Users. That this was the position of the government at that time is further borne out by the arrangement approved by the Secretary of the Interior and reduced to writing, and later incorporated in the decree as a part of Article VIII, which provision we will later discuss in detail.

After the San Carlos Act was passed, this original suit was instituted on October 3, 1925. It was there asserted, and so far as this record shows for the first time, that the Indians had extensive rights alleged to be prior to the rights of the Upper Valley Users. This contention was disputed by the Upper Valley Users and with the controversy in that status, at a conference held in Washington before Secretary Wilbur of the Department of the Interior, attended by representatives of the government and the various irrigation districts on the river, a plan for compromising the controversy was proposed and reduced to writing. (Petitioners' Exhibit No. 2, Tr., Vol. I, pp. 85-87.) That writing provides that in order to reach a fair and equitable settlement of the matter and to avoid further litigation, a plan had been formulated, providing, among other things, that the rights of the Indians should attach to and be first satisfied out of the flood waters to be stored in the reservoir and that unless and until stor-

age was provided on the upper river for the irrigation of the lands of the Upper Valley Users, they should be entitled to continue the diversion and use of the waters of the river to the extent that they were being used and enjoyed in 1924 when the San Carlos Act was passed.

It was pursuant to this plan that the litigation was compromised and the decree entered in the case. The decree itself, Article VIII, (Tr., Vol. II, page 106) carries forward and incorporates this provision of the plan to the effect that the Upper Valley Users should be entitled, in disregard of any rights of the Indians, to continue the use of the waters of the river as they had therefore used them prior to the passage of the San Carlos Act.

It must be borne in mind that the decree entered was a consent decree, the consent of the Upper Valley Users to its entry being based, as shown by Article VIII, upon the provision that they were to be permitted to continue to use the waters of the Gila River as they had theretofore used them prior to 1924. There was, of course, no formal trial or adjudication of respective rights and priorities. What is set down in the decree is wholly the result of a compromise and agreement reached by the parties themselves. The court was not called upon to inquire into and adjudicate the respective priorities of the parties. The preamble of the decree shows that it is nothing but a compromise agreement. (Tr., Vol. II, page 6.) In interpreting the decree, the court should therefore take into consideration the facts and circumstances surrounding its entry

and keep in mind the respective contentions of the parties and the fact that the decree is an agreement, rather than a formal adjudication entered pursuant to a trial on the merits.

The decree, being a consent decree, must be interpreted in the same manner as though it were a contract. This rule is supported by later citations in this brief. That this court should take into account the facts and circumstances surrounding the entry of the decree is equally clear from the statement of the Supreme Court of the United States in the case of *Reed v. The Merchants Mutual Insurance Company of Baltimore*, 95 U. S. 23, 24 L. Ed. 348, 349, where Mr. Justice Bradley, speaking on behalf of the court, says:

“Although a written agreement cannot be varied (by addition or subtraction) by proof of the circumstances out of which it grew and which surrounded its adoption, yet such circumstances are constantly resorted to for the purpose of ascertaining the subject-matter and the standpoint of the parties in relation thereto. Without some knowledge derived from such evidence, it would be impossible to comprehend the meaning of an instrument, or the effect to be given to the words of which it is composed. This preliminary knowledge is as indispensable as that of the language in which the instrument is written. A reference to the actual condition of things at the time, as they appeared to the parties themselves, is often necessary to prevent the court, in construing their language, from falling into mistakes and even absurdities.”

Had the matter been litigated and the various priorities of the parties determined as a matter of law and of right, there would have been no occasion for this lengthy decree. The various rights and priorities of the parties set up in the priority schedule of Article V would have been substantially all that was necessary for the decree to contain.

With the foregoing facts in mind, we will proceed to an analysis of the decree.

Analysis of Decree

The decree consists of thirteen articles, each dealing with some different phase of the matter. These articles must, of course, be construed so as to give effect to all of them, and necessarily what is said in one article is modified by what is contained in the others.

Since the right given the Upper Valley Users to disregard priorities under the terms of the decree is defined in Article VIII and this controversy revolves around the provisions of that article, we deem it proper to analyze it before attempting to analyze the other articles of the decree.

Article VIII

(Tr., Vol. II, pp. 106-7.)

(This Article printed Appendix, pp. 20-27.)

This article is the most important provision of the decree as it relates to this controversy, because it applies wholly to the manner in which the Upper Valley

Users are to be permitted to use the waters of the stream. Other portions of the decree are important here only insofar as they throw light upon the meaning of this particular article.

This article makes provision for diversion and use of the waters of the river in *disregard* of the Priority Schedule. It is devoted to setting out what was agreed to be given the Upper Valley Users in consideration for their consenting to the decree. These Upper Valley Users conceded to withdrawing their contentions with regard to priorities as set forth in their pleadings in the case, and permitted the plaintiff to set up a prior right to a quantity of land almost equal to the total of the entire land of the Upper valleys, *but only upon the condition, as stated in this article, that they were to be permitted to use the water as they had theretofore used it.*

The first paragraph of the article sets forth what had been agreed upon so far as the rights of these defendants to divert the waters of the river are concerned. It starts out by saying that the rights of these defendants are junior to the rights of the plaintiff which are set down and referred to in the Priority Schedule, but further identified and particularly described in Articles VI and VII of the decree. It then provides (reading from Tr., Vol. II, page 106):

“that, however, plaintiff and said defendants, in recognition of the desirability of making it *practicable for said defendants to carry on the irrigation of said Upper Valley lands to the extent to*

which the areas to which their said rights apply heretofore have been irrigated and so that the said San Carlos Act shall inure in part to their benefit and this suit may be compromised and settled, have agreed that the following provisions shall be and they are hereby embodied in this decree, which said provisions in turn, and in so far as they affect the other parties in this cause, shall inure to the benefit of and be binding upon them.” (Italics ours.)

In other words, in order to induce these defendants to agree upon a settlement and thus avoid the necessity of litigating the issue, it was agreed between all the parties that the Upper Valley Users were to be permitted to carry on the irrigation of their lands to the same extent to which they had theretofore been irrigated. It sets forth that this agreement is made in recognition of the desirability of making it practicable for these users to so carry on the irrigation of their lands, and in order that a compromise and settlement might be reached. It required no further language to vest that right in the defendants, and if the language following that agreement, which was inserted in the decree for the purpose of carrying the agreement into effect, is to have placed upon it the construction contended for by the plaintiff, the court would obviously be construing the language in a manner to prevent the carrying out of the contract, rather than construing it in a way to put it into effect. Courts will, of course, always construe language so as to produce the result

obviously intended by the parties, rather than to defeat it.

See:

17 C. J. S., p. 689, para. 295 (a); p. 707, para. 297;

Christian v. Waialua Agr. Co. et al., 93 Fed. (2nd) 603-615 (Ninth Cir.).

The obvious purpose of Paragraph (2) of this article (Tr., Vol. II, p. 106) is to set up the machinery or means of carrying into effect what was agreed to between the parties in the first paragraph, namely, the right of the Upper Valley Users to use the water as they had theretofore used it, although such use necessarily meant disregard of certain of the rights of plaintiff as set up in the preceding articles. This paragraph starts off with the following provision:

“That on the first day of January of each calendar year, or as soon thereafter as there is water stored in the San Carlos Reservoir, which is available for release through the gates of the Coolidge Dam for conveyance down the channel of the Gila River and for diversion and use on the lands of the San Carlos Project for the irrigation thereof, then the Water Commissioner, provided for herein, shall, to the extent and within the limitations hereinafter stated, apportion for the ensuing irrigation year to said defendants from the natural flow of the Gila River an amount of water equal to the above described available storage, and shall permit the diversion of said amount of water from said

stream into the canals of said defendants for the irrigation of said Upper Valley lands in *disregard* of the aforesaid prior rights of plaintiff used on lands below said reservoir;” (*Italics ours.*)

It will be observed that the water which the Commissioner is to apportion to these users is such stored water as “is available for release through the gates of Coolidge Dam for conveyance down the channel of the river and for diversion and use on the lands of the San Carlos Project for the irrigation thereof.” The reason for the use of the words “available for release” is due to the fact that there is a certain amount of dead storage in the reservoir, and of course until the water had run in sufficiently to come up to the point where it could be released, it could not be “available” for use on the Lower Valley lands and hence, until that point was reached, Upper Valley Users would not be entitled to an apportionment. However, when water has run into the reservoir, which is available for release, then the Commissioner is required to make an apportionment to the Upper Valley lands and permit diversion of the amount of water so apportioned, “in *disregard* of the aforesaid prior rights of plaintiff used on lands below said reservoir.” This must, of necessity, mean that such apportionment is to be made without regard to plaintiff’s rights set up in the Priority Schedule.

This paragraph further provides (quoting from Tr., Vol. II, p. 106):

“the diversion of said amount of water by said defendants to be in accord with the priorities *as*

between themselves stated in said Priority Schedule and for the irrigation of the lands covered by the rights accredited to said defendants in said Priority Schedule and the quantity of water permitted to be taken by said defendants in disregard of prior rights of the United States below is in addition to and not exclusive of the rights of said defendants to take from the stream in the regular order of their priorities as shown by the Priority Schedule, but of course within the duty of the water limitations of this decree;" (Italics ours.)

The court will note that it is provided in the foregoing quoted language that the diversion and use of the amount of the water apportioned to Upper Valley Users is to be used in accordance with the priorities, *as between themselves, stated in the Priority Schedule*, but it is not provided that it shall be used with any regard to the prior rights of the plaintiff as stated in said Schedule. This for the reason that the preceding portion of the paragraph has already provided that Upper Valley Users' diversion and use of the water shall be "in disregard" of plaintiff's rights. This language also shows that not only is the apportionment to be made in disregard of plaintiff's rights, but that the Upper Valley Users are to be permitted to take the water from the stream in disregard of plaintiff's rights.

This paragraph further provides (Tr., Vol. II, p. 106):

"that if and when at any time or from time to time in any year, water shall flow into said reservoir

after said date of first apportionment and shall be stored there and become added to the available stored water in said reservoir, the said commissioner shall make further and additional apportionments to said defendants of the natural flow of said stream as the same is available at the diversion points of said defendants, which said apportionments shall in turn correspond with and be equivalent in quantity to the amount of such accessions or newly available stored water supply;”

Here reference is made to “available stored water,” and it is provided that the Commissioner shall make additional periodical apportionments of such available stored water whenever it flows into the reservoir and becomes added to the available stored water supply. Again the term “available stored water” is used for the reason that the Commissioner would have no right to make an additional apportionment to the Upper Valley Users unless the waters running into the reservoir were available for release and use by the Lower Valley lands. Not all water running into the reservoir is subject to apportionment, but only such water as runs in and can be released for use on the Lower Valley lands. It is easily conceivable that water might flow into the reservoir and be added to the dead storage and still not be available for release. The same would be true of water running into the reservoir when it was full and the water was running over the spillway. In such case, the incoming water would likewise not create available storage. Under such circumstances, no appor-

tionment could be made, and it was for this reason that the word "available" had to be used.

Any water running into the reservoir becomes stored water. The lake is several miles in length and it would be impossible to convey the stream running in, through the water then in storage, out of the lake. The mere fact that an equivalent amount of water may be withdrawn at the same time as the new waters running in, does not prevent the incoming water from being stored water. It is there, stored in the reservoir, and is added to the water already stored there, and if conditions are such as to make the water available for release, it becomes added to the available stored water in said reservoir. If a man has grain in storage and pours in a quantity at the top of the elevator and at the same time takes out a similar quantity from the bottom of the elevator, it surely cannot be said that the new grain is not an "accession" and is not added to the old grain that was stored in the elevator.

The above quoted language of necessity means that the subsequent apportionments made after the first annual apportionment must take into account all water flowing into the reservoir and available for release without regard to whether or not Lower Valley Users have seen fit in the meantime to withdraw and use the water as fast as it has flowed into the reservoir. If apportionments are subject to plaintiff's control and can depend upon whether or not plaintiff sees fit to leave the water in the reservoir, then use of the waters by the Upper Valley Users could not be "in disregard"

of plaintiff's rights. Under the construction of the decree adopted by the District Court, except in flood periods, no water can be apportioned to the Upper Valley Users unless plaintiff sees fit to leave water in the reservoir sufficient to raise the lake level. Under such construction, apportionments to Upper Valley Users are under the control of the plaintiff and clearly not "in disregard" of its rights. Whereas, under the construction Upper Valley Users are contending for, when the water runs into the lake, they are entitled to the apportionment of an equivalent amount and the right to use the same without regard to whether or not the plaintiff sees fit to permit the water to remain in the reservoir.

Quoting further from said paragraph, (Tr., Vol. II, pp. 106-7), it is provided:

" . . . that in calculating apportionments of the stored water supply the Water Commissioner shall make appropriate deductions for losses for evaporation, seepage or otherwise that may be suffered between the time of the apportionment and that of the diversion of a corresponding quantity of water from the stream; that such apportionments, corresponding with net accessions during each annual period after first apportionment, shall be made by said Water Commissioner at least as frequently as once per calendar month (provided accessions to stored supply have occurred during that period) and at such more frequent intervals as the conditions in his judgment may demand.

. . . "

This provision specifically instructs the Commissioner as to what deductions may be made in arriving at the amount of the periodical apportionments. It authorizes deductions for losses from evaporation and seepage, and nothing more. Obviously, had it been intended that the Commissioner was also to deduct all water that had been withdrawn in the meantime by the plaintiff for the proper irrigation of eighty thousand acres of Lower Valley lands, this deduction would have been included with the others, because it is of far greater consequence. It seems absurd that a deduction for such minor matters as loss from evaporation or seepage would be specifically mentioned and included, and a major deduction such as that made by the Commissioner for waters withdrawn by the plaintiff would be omitted, unless it had been intended that such waters so withdrawn were not to be deducted in making the apportionments.

The second clause in the above-quoted portion provides that periodical apportionments made by the Commissioner shall correspond with "net accessions" during each annual period after the first apportionment, provided accessions "have occurred." "Net accessions" means such water as had run into the reservoir and is available for release, less the deductions that the Commissioner is authorized to make in the preceding sentence, namely, deductions for evaporation and seepage, and nothing more. After these deductions have been made, what is left is the "net accession." And it is obvious, from the language used, that the water does not

have to remain in the reservoir. The language merely provides that if such accessions "have occurred" during the period, they shall be included in the next apportionment.

This paragraph goes on to say that the apportionments made by the Commissioner for any calendar year shall not carry over or be available for the succeeding year. It was for this reason that Paragraph 4 of this article (Tr., Vol. II, p. 107) was inserted, providing that if the plaintiff withdraws water in a quantity greater than is allowed for the proper irrigation of eighty thousand acres, such excess shall be considered as stored in the reservoir for the purpose of arriving at the amount of the first annual apportionment. In other words, this was a safeguard so that the Upper Valley users would be assured of having some apportionment at the beginning of each calendar year, in order to entitle them to begin using the water without waiting for that year's supply to start flowing into the reservoir.

This paragraph also provides (Tr., Vol. II, p. 107):

" . . . that the diversions made by said defendants of the natural flow of the Gila River thus apportioned to them *in disregard* of said prior rights of plaintiff, shall be regulated by the Water Commissioner . . . in accord with the rights and priorities accredited to each of said defendants in said Priority Schedule." (Italics ours.)

This again makes it apparent that the Priority Schedule is applicable only as among the Upper Valley Users

themselves, and that the apportionments to be made to them by the Water Commissioner are to be “in disregard” of plaintiff’s prior rights and not in accord with its rights set up in the Priority Schedule as against these users. This also shows that it was intended that both apportionments and diversions were to be made by Upper Valley Users *in disregard* of plaintiff’s prior rights.

This paragraph further provides (Tr., Vol. II, p. 107):

“ . . . provided always that such diversions shall be limited to the amount of water then apportioned, as aforesaid, and in any event, during each irrigation season, do not and shall not exceed the total amount of water called for under the right accredited in said Priority Schedule to any given defendant, namely: 6 acre feet per acre for the irrigation season as defined in Article V hereof; and provided further that the drafts on the stream by the upper valley defendants shall be limited to a seasonal year diversion which will result in an actual consumptive use from the stream of not to exceed 120,000 acre feet of water; . . . ”

In the light of this provision, we call the court’s attention to the fact that the right being asserted by these users is not as broad as it appears on its face. Under the decree, they are limited to 6 acre feet and have a further and more restrictive limitation, in that the entire lands in the Upper Valleys, consisting of approximately 40,000 acres, are limited to a total con-

sumptive use of 120,000 acre feet per year. There is a further practical limitation of great importance, and that is, that regardless of what amount of water may be apportioned to these users they can only take such part of it as may be available in the stream, which is frequently entirely dry, during the time the apportionments exist, whereas the Lower Valley lands are always assured of their water before anything can be apportioned to the Upper Valleys.

The decree further provides, and it was agreed, that the construction of the dam was to inure in part to the benefit of these users. Under the limitations that have been pointed out and operated under the construction approved by the lower court, it is difficult to see how the construction of the dam inured to the benefit of these users. Prior to its construction they were using the water at will. Now, according to plaintiff's contention, they are using it at the will of the Lower Valley Users.

Paragraph 5 of this article (Tr., Vol. II, p. 107) provides that if, by reason of lack of available storage in the reservoir, no apportionment can be made to these users, or as soon as they have used up such apportionments as have been made, that then and in that event they can no longer use the water in disregard of the plaintiff's rights, but shall use it in accordance with the rights of the parties set up in the Priority Schedule. If it had not been intended that Upper Valley Users were entitled to disregard the prior rights of plaintiff

during such times as there was any water to apportion, this provision of the decree would be meaningless.

Most of Paragraph 6, Article IX (Tr., Vol. II, p. 110) and Paragraph 3 of Article X (Tr., Vol. II, p. 111) are devoted to expressing exactly the same proposition showing again that it was intended that priorities of the Lower Valley Users would be disregarded so long as there was available water for apportionment.

Under the plaintiff's construction, these two provisions of the decree would be equally as meaningless as sub-paragraph 5 of Article VIII.

There is a further provision in Article IX (Tr., Vol. II, p. 109) that:

“ . . . if there is any natural flow in the Gila River at the point where said stream enters the San Carlos Reservoir, so much thereof—will be allowed to flow through said reservoir into the channel below.”

(This is limited for the purpose of supplying Kennecott Copper Company.)

Here is a specific provision, and the only one in the decree for passing natural flow water through the reservoir.

If it was intended, as plaintiff contends, to pass the so-called natural flow through the reservoir for the use of plaintiff under its prior rights, it seems peculiar that no provision similar to this was made in Article VIII, since the amount of water going to plaintiff is of far greater importance than the small quantity going to Kennecott Copper Company.

The court will also find in Article IX and X (Tr., Vol. II, pp. 108-111), providing for the comparatively small quantities of water to be used by Kennecott Copper Company and by Anderson, Herring, and Glasspie, that the "natural flow" of the river is defined and is computable. The reason it is defined in these articles is because it is material to their rights. However, no definition of the natural flow is attempted in connection with the rights of plaintiff because, under the terms of the decree, it is not material as to their rights. If the term were obvious and computable for the San Carlos Project, it would not have to be defined for these other parties.

The foregoing is the contention of the Upper Valley Users with respect to the interpretation that should be given to Article VIII of the decree. It is the position of the Upper Valley Users that nothing contained in the other articles of the decree in any way militate against such interpretation, but on the contrary strengthen it. In order to make our position clear in this respect, we will proceed to an analysis of the other articles of the decree.

Articles I, II, III and IV

(Tr., Vol. II, pp. 6-11.)

These articles deal with parties, dismissals and withdrawals, and matters of that character that have no bearing on this controversy, with exception of the preamble (Tr., Vol. II, p. 6; Appendix, p. 1) which does

point out, as is recognized throughout the decree, that it is a consent decree entered into for the purpose of settling all of the issues between the parties without the necessity of having a trial and an adjudication of them by the court.

Article V

(Tr., Vol. II, pp. 12-85.)

(This article, exclusive of priority schedule, printed Appendix, pp. 2-8)

This article points out that all of the parties named in the action have acquired and own certain rights in the use of the waters of the Gila River in connection with certain specified lands owned by such parties. Following the provisions of this article, which recite its purpose, the names of the various parties and canal companies having rights in the stream are set forth in the order of their priorities, as agreed upon, together with a description and location of their lands and their points of diversion. This portion of the decree occupies in excess of seventy pages and is referred to throughout the decree as the "Priority Schedule." In reciting the reasons for including this schedule, the article, with reference to some of the rights of plaintiff, provides (beginning with the last line Tr., Vol. II, page 12):

"That these rights, having priorities in great number, ranging from the year 1868 to 1914 inclusive, are set down in their order in said Schedule and

totalled for each year, etc. . . . *all to the end that said rights may be identified and preserved.*" (Italics ours.)

And speaking further of the rights of the plaintiff to divert water from the river under the so-called Indian rights, it is provided that said rights (Tr., Vol. II, page 13) :

"are set down and outlined in their proper order in said Schedule *as a matter of convenience, but each of said rights, furthermore, is specifically defined and decreed in later articles hereof.*" (Italics ours.)

Again speaking of the purpose of the Priority Schedule, Article V, with reference to the rights of diversion on the part of certain canal companies, says (Tr., Vol. II, page 13) :

"*all to the end that the diversion rights of said canal companies may be adequately defined and the individual rights of said defendant land owners to maintain, arrange or contract for, under applicable statutes and provisions of law, the diversion and carriage of water from the stream to said lands under and in accord with said rights may be identified and preserved.*" (Italics ours.)

It is apparent, of course, that before an agreement could be made as to how the various rights of the parties were to be exercised, those rights had to be determined and set down. This, as the decree says, is for the purpose of convenience in subsequently discussing such

rights and agreeing upon the manner in which they might be exercised.

Furthermore, it must be remembered that this decree adjudicates the rights of only a part of the appropriators of water from the Gila River and its tributaries. Consequently, great care had to be exercised, and was exercised, throughout the decree to make it clear that in agreeing to the disregard of certain rights of the parties in connection with the use of the water, those rights were not being waived or surrendered *so far as third persons, not parties to the decree, were concerned*. And this reason for setting out the Priority Schedule in the decree is recited in several instances in Article V, particularly in the portions we have quoted.

That the rights of the various parties set up in the Priority Schedule were to be limited and modified by the subsequent provisions of the decree is shown by the subsequent articles providing in detail for limitations upon such rights.

It is inconceivable that the Upper Valley Users who were in court contending that the plaintiff had no rights prior to theirs, would have conceded, without even a trial of the issue, the priority of plaintiff to some thirty-seven thousand acres, if it had not been understood and agreed that the Upper Valley Users were to be permitted to use the waters of the stream in disregard of those priorities. In other words, if the Priority Schedule is the controlling factor in this decree, and the rights given to the Upper Valley Users are not to be exercised in disregard of priorities set up in the Sched-

ule as the decree specifically provides, then there was no compromise so far as the Upper Valley Users were concerned. They simply conceded the substantial part of the claims of the plaintiff without receiving anything in return. It is inconceivable that this would have been done without a trial of the issue on its merits, and when Article V is read in connection with Article VIII it becomes apparent that this is not the effect of the decree. It is clear that the priorities set up in this article are superseded by the provisions of Article VIII insofar as they conflict in any way with the right of the Upper Valley Users to take and use the water in disregard of prior rights.

Article VI

(Tr., Vol. II, pp. 86-105.)

(This article, exclusive of description of lands, printed Appendix pp. 8-18).

We have pointed out that Article V, in providing for the Priority Schedule, states that the rights of plaintiff are there set down for convenience, and in order that they may be identified and preserved, but these rights will be more specifically defined and decreed in subsequent articles of the decree.

The purpose of Article VI is to "more specifically define and decree" the rights of plaintiff, each defining some specific right of the Lower Valley Users. None of these paragraphs bear directly on this issue. (However the provision dividing the Indians' prior rights

with White lands having rights junior to the Upper Valley Users, is significant in the interpretation of Article VIII for reasons we will hereafter discuss.)

All of the rights so defined are, of course, subject to the rights of other parties as set forth later in the decree, and all constitute limitations upon the rights set forth in Article V. If there were not limitations on the rights set forth in the Priority Schedule, the arrangements set forth in Paragraph 3, sub-section (b) of the decree (Tr., Vol. II, page 92), wherein it is specifically provided that the water being divided with the White lands includes the immemorial right of the plaintiff set up in Priority Schedule, would be wholly inconsistent. In other words, such an arrangement could not possibly exist under an observance of the Priority Schedule.

Article VII

(Tr., Vol. II, page 105.)

(This Article printed in Appendix pp. 18-20)

This article is further conclusive evidence of the fact that it could not have been intended that the rights set up in the Priority Schedule were to be without limitation. Under the provisions of this article, arrangement is made for the distribution of all water to all of the lands in the entire project, except in times of scarcity, when it is provided that distribution shall be made under Article VI of the decree. But under the provisions of Article VI, it is impossible to be on strict prior-

ities because it is provided, as we have heretofore pointed out, that some twenty-seven thousand acres of White lands are entitled to share in the waters belonging to the thirty-five thousand acres of Indian lands under their priorities set up in Article V. By this provision in Article VI, the priorities accorded the Indian lands in the Priority Schedule have been divided with the White lands, and it would be utterly impossible under any set of circumstances, whether scarcity exists or not, for the Indian lands to insist upon their full right of priority as defined in the priority schedule. That right had already been bartered away.

Actually this is not a controversy between the Upper Valley Users and the Indians. Even though the United States is plaintiff, the real parties in interest in the Lower Valley are White settlers, who were defendants in the original action and who have lands possessing water rights for the most part junior to the rights of the Upper Valley Users. Their interest in the controversy that exists now is due to the fact that they have made a contract with the Indians, providing for their use of approximately half of the Indians' prior rights on their own lands, as appears in article VI of the decree. (Tr., Vol. II, p. 92.) If the water is to be distributed according to the Priority Schedule, that agreement could not be put into effect.

The effect of this agreement, dividing the Indian waters with White lands in the Lower Valley, having rights junior to the lands of the Upper Valley Users, is to permit the disregard of the well-established prin-

ciple of water law in Arizona, that if the senior appropriator does not use the water the next appropriator in point of time is entitled to it. Prior to the entry of the decree, if we concede that the Indians had prior rights, these Upper Valley Users would have been entitled to use the water, whenever the Indians failed to use it, before it could have been used by any lands of junior White appropriators in the Lower Valley. It is difficult to believe that the Upper Valley Users would have given up this right had it been intended that Article VIII of the decree was to be interpreted as the lower court has held. On the other hand, if Article VIII is to be interpreted as we contend, and so that the Upper Valley Users receive an apportionment of all water running into the reservoir, without regard to whether it is immediately withdrawn and used by the Lower Valley Users, then this agreement to divide the Indian waters with the junior White lands would be consistent and understandable, as it would be a matter of indifference to the Upper Valley Users what was done with the water in the reservoir after they had received their apportionments. Because the effect of this agreement in the light of such interpretation would be to strip these users of their secondary right and to make 60,000 acres prior to them instead of 35,000 acres owned by the Indians.

These arguments are advanced for the purpose of showing that it was never intended that Article VIII should be interpreted as it has been by the lower court; that it would be utterly impossible to operate on the

Priority Schedule; and are in answer to any possible contention that the decree is such a decree as would be entered in a relative rights determination. No court could ever have rendered a decree containing provisions such as are set up in Articles VI, VII and VIII. Those provisions are, of necessity, the result of an agreement to disregard priorities, and could not have been inserted in the decree except upon the consent of the parties in realization of the fact that the water was not to be administered on the basis of priorities, but instead, in accordance with the agreement made between the parties. Hence, it is vital for the court to determine not what the priorities are, but what the agreement was.

Articles IX, X, XI, XII and XIII

(Tr., Vol. II, pp. 108-113.)

(Article IX is printed at pp. 27-35; Article X, pp. 35-39; Article XI, pp. 39-41; Article XII, pp. 41-43 and Article XIII, pp. 43-44

Appendix.)

Article IX defines the rights of Kennebecott Copper Company to take water from the stream, and Article X defines the rights of Anderson, Herring and Glasspie to take the water accredited to them under the decree.

These articles have no direct bearing on the rights of the Upper Valley Users and are not particularly material in considering the question at issue. However, each of the articles does contain a paragraph practically identical with sub-paragraph (5) of Article VIII, by which it is again provided that, in the event

there is no apportioned water available for the use of the Upper Valley Users, then the diversions of these parties whose rights are defined in these two articles shall be made in accordance with their priorities, as the same are set forth in the Priority Schedule, showing again that the water was not to be administered upon priorities but according to agreement.

Article XI is applicable to all parties to the decree but deals with the economical and beneficial use of the water without in any way defining any particular rights of any of the parties as against any of the others. It does, however, indicate that in framing the decree, the parties had in mind the well-established principle of the water law of Arizona that all possible means must be adopted to conserve the water and apply it to the most economical use. We call the court's attention to the fact that under the interpretation of the decree, approved by the lower court, it is to the advantage of the Lower Valley Users, in times of scarcity, instead of conserving the water, to withdraw it as quickly as it runs into the reservoir, whether its use is economical or not, and in that way prevent a rise in the level of the lake, and consequently an apportionment to the Upper Valley Users. On the other hand, if the interpretation contended for by the Upper Valley Users is adopted, the incentive to withdraw water, except for economical use, is removed as it makes no difference in the amount of apportionment they will receive whether the Lower Valley Users immediately withdraw the

water or permit it to remain in the reservoir. Their rights are exactly the same in either event.

Article XII relates to the appointment of a Water Commissioner and grants the right to any aggrieved person to complain to the court and obtain a prompt review of the Commissioner's actions.

Article XIII is the concluding article of the decree and enjoins all of the parties to the decree from claiming or asserting against any other parties to the decree any rights to the waters of the river except those specified and allowed by the decree. It also provides for the retention of jurisdiction by the Court for certain limited purposes defined in said article.

Summary of Appellants' Argument on Specification of Error No. 1

Summarizing, appellants' position with regard to Specification of Error No. 1, is as follows:

1. The decree entered June 29, 1935, is a consent decree, drafted and entered pursuant to the agreement of all parties to the litigation.

2. The agreement of the parties, pursuant to which the decree was drafted and entered, is stated in substance in Petitioners' Exhibit No. 2 (Tr., Vol. I, pp. 85-87), which is the letter approved by the Secretary of the Interior and which provides that the Upper Valley Users shall be entitled to continue the diversion and use of the waters from the flow of the Gila River to the extent that such use was being enjoyed in 1924 when the San Carlos Dam was authorized by Congress.

3. That the understanding and agreement, pursuant to which the compromise was reached and the decree agreed upon, is set forth in substance in the first paragraph of Article VIII of the decree. (Tr., Vol. II, p. 106), in the following language:

“plaintiff and said defendants, in recognition of the desirability of making it practicable for said defendants to carry on the irrigation of said Upper Valley lands to the extent to which the areas to which their said rights apply heretofore have been irrigated and so that the said San Carlos Act shall enure in part to their benefit and this suit may be compromised and settled, have agreed that the following provisions shall be and they are hereby embodied in this decree. . . . ”

4. That in the construction of Article VIII and in determining the meaning of its provisions subsequent to the language above quoted, the court must bear in mind the general purpose of the article and so construe its language as to effectuate that purpose.

5. That under the language adopted in Article VIII for the purpose of carrying the agreement with the Upper Valley Users into effect, the decree means that the Water Commissioner shall, in making each apportionment subsequent to the first apportionment made on January 1 of each year, take into account and apportion to the Upper Valley Users a quantity of water equivalent to *all* water running into the reservoir since the date of the last apportionment and available for release to the lands in the San Carlos Project,

less an appropriate deduction for seepage and evaporation.

6. That the foregoing interpretation is the only one which will permit the Upper Valley Users to take water in disregard of the prior right of plaintiff and carry out the terms of the understanding set forth in the above quoted provision.

7. That the other provisions of the decree, when considered in light of the purpose and language of Article VIII, are not inconsistent with appellants' construction of its meaning.

SPECIFICATION OF ERROR NO. 2

The lower court held that the decree did not mean what the Upper Valley Users contended that it meant and what we have set forth as its meaning in our argument under the preceding Specification of Error. On the contrary, the court held that the interpretation contended for by appellee was correct and that the provisions of Article VIII of the decree, with respect to "stored water" were clear and unambiguous.

We do not want to be understood as taking an inconsistent position. We believe that the decree means precisely what we have contended it meant in our argument under Specification of Error No. 1. We further believe that it is impossible to read the decree and say that it clearly means what the lower court says it means without ignoring the provisions of the decree respecting the rights of the Upper Valley Users. We refer

specifically to the language of Article VIII, providing that all parties have agreed that the Upper Valley Users shall continue to use the water as they had theretofore used it prior to the passage of the San Carlos Act. There can be no question but that prior to the passage of this Act the Upper Valley Users had used the waters of the river at will and without hindrance from any source whatsoever, and without regard to any claimed right to use the waters in the Lower Valley. Their rights in this respect had never theretofore been disputed. If, as the lower court held, the language of the decree now compels them to permit the irrigation of some eighty thousand acres in the Lower Valley without receiving any corresponding apportionment for the water so used, it is plain that the provision of Article VIII above referred to must be ignored. Under this construction there is no use of the waters of the Gila River by the Upper Valley Users "in disregard of the aforesaid prior rights of plaintiff used on lands below said reservoir."

In light of the foregoing, it is our position that if the decree does not clearly mean what we have contended that it means in our argument under Specification of Error No. 1, then surely it does not clearly mean what the lower court held, but is ambiguous, and the term, "stored water," as used in the decree, is not clear, but is ambiguous and the court should have received evidence to aid in its interpretation.

SPECIFICATION OF ERROR NO. 3

After the lower court had held that the decree did not mean what the Upper Valley Users had contended it to mean, appellants offered evidence to show its true intent and meaning. The substance of this evidence, as set forth under Specification of Error No. 3, was the testimony of witnesses who represented the Upper Valley Users and were present and participated in the framing of the decree. This evidence, if admitted, would have shown that it was agreed at the time the decree was framed and entered that it was the understanding of all the parties to the litigation that the decree, as framed, meant what the Upper Valley Users are now contending that it means.

Objection was made to the introduction of this evidence upon the ground that it was immaterial, for the reason that the decree was clear and plain, and that therefore oral testimony or any testimony whatsoever was not admissible to explain or interpret it. (Tr., Vol. I, pp. 34-35.) This objection was sustained and the evidence excluded. (Tr., Vol. I, p. 105.)

The court, having refused to construe the decree in accordance with the contentions made by appellants, should surely have permitted the introduction of the proffered evidence to have established the intent of the parties and clarify the meaning of the decree. That courts will always permit the introduction of evidence to establish the intent of the parties where a contract is found to be ambiguous needs no citation of authority.

Hence if, in fact, the decree is ambiguous, the court should have permitted the introduction of evidence, showing the intention of the parties in order to arrive at its true meaning, because a consent decree in this respect is no different from a contract.

34 C. J. (Judgments) 133, Sec. 337 ;

Vol. 3, Freeman on Judgments, 2773 ;

Garrett & Co. v. Sweet Valley Wine Co., 251 Fed.
371, Dist. Ct. N. D. Ohio.

CONCLUSION

The case should be reversed with directions to the lower court to instruct the Water Commissioner to administer the decree in accordance with the interpretation contended for by appellants.

Respectfully submitted,

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APPENDIX

APPENDIX

DECREE

This cause came on to be heard at this term, and thereupon it was shown to the court:

That the plaintiff and the parties defendant whose claims and rights have been presented by answer or stipulation and remain for determination herein, have concluded and settled all issues in this cause as between plaintiff and said parties defendant, and as between said defendants and each of them and every other thereof, and mutually have agreed—all as evidenced, for plaintiff, by the assenting signatures, endorsed at the end hereof, of its solicitors of record and the Attorney General and Secretary of the Interior of the United States, and for said defendants, by the assenting signatures, likewise endorsed at the end hereof personally, or of their several solicitors of record—that such settlement should be embodied in and confirmed and made effective by way of the within decree of the Court in this cause, defining and adjudicating their claims and rights as against each other in identical form and substance as hereinafter set forth; and the Court upon consideration thereof and of the record herein as to the disposal of the parties defendant who have been separated from the cause, and being duly informed in said premises, doth find, order, adjudge, and declare its decree herein to be as follows, namely: . . .

That each of the parties named in the Schedule of Rights and Priorities set out below and made part hereof (hereinafter for convenience often referred to as the Schedule or Priority Schedule), in proper person or in the representative capacity indicated, has acquired and owns the right or rights accredited to him in said Schedule; that the Gila River is the stream from which the water called for under each of said rights is and may be diverted; that the point of such diversion, the name or description of the dam, canal, or other appliance through which said diversion is accomplished and said waters are carried to the lands through the irrigation of which said right has been acquired, together with—as to individual defendants, and plaintiff where the appropriation rights of others have been conveyed to it as hereinafter further described—the description of said lands and the number of irrigable acres thereof in each quarter or quarter-quarter section, or lot or lots as the case may be, to which said right applies, are as stated in said schedule opposite the name of each of said parties in appropriately designated columns thereof; that the priority date of each of said rights is as stated for each owner in the column so designated, and such owner is entitled thereunder and as of the date of said priority to divert from the natural flow of the stream, at the point of diversion so designated and to carry and convey to, and apply to beneficial use upon, said lands for the irrigation thereof,

during each irrigation season, a total amount of water not exceeding 6 acre feet per each acre of said lands, which said amount shall not be diverted from the stream at any time during said season at a greater rate than one-eightieth ($1/80$) of a cubic foot per second for each acre of said lands, except as hereinafter provided; that the right of direct diversion from the natural flow of the stream for each of said parties, therefore, may be readily calculated, for the area then being irrigated, as follows:

- No. of acres times 6 = Total allowable diversion in
acre-feet during each irri-
gation season;
- No. of acres times $1/80$ = Rate of diversion in cubic
feet per second which shall
not be exceeded in making
said draft;

provided, however, that the water commissioner hereinafter provided for, in order to take proper advantage of sudden freshets or other periods of more plentiful natural flow in the stream, may authorize and provide for, and as to the lands of defendants above the San Carlos Reservoir shall permit, when no injury will result to others not being so accommodated, diversions therefrom under said rights at a greater rate than $1/80$ of a cubic foot per second, but subject to the explicit condition that the total diversion for the lands involved shall not exceed during the irrigation season the said total of 6 acre feet per acre; that the right of each of said parties, based upon the total area involved in each

instance, is stated in acre feet per irrigation season, and in cubic feet per second (maximum rate of diversion as aforesaid), opposite the names of said party, respectively in the last two columns of said schedule; that this right for each of said parties entitles him to a first and prior call to the extent thereof upon the available natural flow of the stream as against others whose rights as listed in said Schedule bear later dates of priority than his own, while others, when their rights have earlier dates of priority than his, have a first and prior call to the extent thereof upon said stream flow as against him; that each of said rights is gauged by and limited to the amount of water which has been and can be beneficially diverted and applied to the irrigation of said lands; that this quantity is determined and adjudged herein to be the amount in acre-feet per acre for the irrigation season stated above, which shall include and be charged with all conveyance loss from the point of diversion from the stream to the lands; that said lands require that there be applied thereto, and therefore diverted from the stream, somewhat larger amounts of water in the hotter summer months of the irrigation season than at any other times therein, of which account is taken by providing herein for a considerably larger diversion right than would be required at constant even flow to produce 6 acre-feet per acre during each irrigation season; that where the figures and data given for a single water right priority are set opposite the names of more than one defendant in said Schedule, each of the same is deemed and held

to have an undivided interest in the whole there described under such mutual contractual relations as may obtain between them, which are not defined or determined in this decree; that certain of the rights accredited to plaintiff in said Schedule may be classified as rights by purchase in that they were acquired by the United States by way of conveyances from the owners of the private lands through the irrigation of which they were acquired, said conveyances being made by way of the "Agreement of Landowners to induce the Secretary of the Interior to undertake the Florence-Casa Grande Irrigation Project, and for the building and operation thereof in case the same is declared feasible" and the "Landowners' Agreement with the Secretary of the Interior, San Carlos Project, Act of June 7, 1924," entered into by the United States and such owners, which were executed and put into effect under and in connection with the Florence-Casa Grande and San Carlos Projects; that these rights, having priorities in great number, ranging from the year 1868 to 1914 inclusive, are set down in their order in said Schedule and totaled for each year under the name of the United States, with the description in each instance of the lands through the irrigation of which they were acquired by appropriation and beneficial use; also, in an appropriate column in each instance the names of the landowners making the conveyances, or their successors in interest, made formal parties defendant herein, are set down; all to the end that said rights may be identified and preserved; that plaintiff, in accord with

said agreements and conveyances, is hereby authorized and empowered to divert from the Gila River the waters called for under said rights for use by irrigation upon the lands of the Florence-Casa Grande and San Carlos Projects as hereinafter further described; that the other rights of plaintiff, which may be generally described as those owned by the United States for and on account of the Indians of the Gila River and San Carlos Indian Reservations and as reservations and appropriations made by the United States for and on account of the Florence-Casa Grande and San Carlos Projects, are set down and outlined in their proper order in said Schedule as a matter of convenience, but each of said rights furthermore is specifically defined and decreed in later Articles hereof; including the right of the United States, as of the year 1924, to store the waters of the Gila River in the San Carlos Reservoir, which is specifically defined in Article VI and is of different character than the rights directly to divert from the natural flow of the stream, with which this Article of the Decree and the Priority Schedule made part hereof primarily has to do; that certain of the rights of plaintiff, as same are set down and referred to in said Schedule, do not accumulate, as is specifically stated and described in the last paragraph of Article VI of this decree; that also certain of the rights of the Nevada Consolidated Copper Company, as same are set down in said Schedule, do not accumulate, as is specifically stated in the first paragraph of Article IX hereof; that as to all other rights to divert the waters of the

Gila River which are set down and defined in said Schedule, including the so-called rights by purchase of the United States (which for convenience here comes within the designation "concern"), when rights of different priorities are ascribed to the same person or concern, said rights as thus accredited to that person or concern do accumulate, so that the total amount of water in acre feet per season which can be taken from the stream, under the priority of any certain date and the priorities of previous dates (ascribed to that person or concern in said Schedule), with the maximum rate of diversion in cubic feet per second governing same, may and shall be ascertained by adding together the number of acre feet per season set down under each of said priorities; that maximum rate at which same can be diverted being also the sum of the maximum rates, in cubic feet per second, given under each of said dates of priority; that rights to divert the waters of the Gila River are decreed to the various canal companies and are set down under their names in the Priority Schedule as of various dates of priority; that the description in each instance of the lands through the irrigation of which said rights were acquired by appropriation and beneficial use and the names of the landowners or their successors in interest, made formal parties defendant herein (and set down under the heading "PARTIES OWNING SAID LANDS WHEN JURISDICTION ACQUIRED HEREIN"), whose beneficial application of water to said lands supported said appropriations are also listed under the names of each

of said canal companies, the amounts of water in acre feet per season, with the maximum rates of diversion, allowed for the irrigation of the various subdivisions of said lands being given in the so-called individual columns under the general heading "Diversion Right" in said Priority Schedule; all to the end that the diversion rights of said canal companies may be adequately defined, and the individual rights of said defendant land-owners to maintain, arrange or contract for, under applicable statutes and provisions of law, the diversion and carriage of water from the stream to said lands under and in accord with said rights may be identified and preserved; that the irrigation season referred to in this Article of the Decree, which shall as well apply to all rights adjudicated herein, is hereby defined as and determined to be the period beginning on January 1st of each year and ending on December 31st of the same year; that the Schedule above referred to and made part hereof is as follows: . . .

VI

That plaintiff has and owns rights in the waters of the Gila River, and in and to the use of said waters, as follows:

(1) The right on behalf of the Pima and other Indians of the Gila River Indian Reservation, their descendants, successors and assigns, to divert 210,000 acre feet of the waters of the Gila River during each irrigation season, from the natural flow in said river at the Ashurst-Hayden and Sacaton diversion dams—

as of an immemorial date of priority and to the extent that such waters are available under said priority—at a rate of diversion not exceeding 437.5 cubic feet per second at any time during such season for the reclamation and irrigation of the irrigable Indian allotments on said reservation, which amount to 49,896 acres, as they now are or hereafter may be made, and of the administrative area on said Reservation which amounts to 650 acres, to the extent that the herein described water right, which is sufficient for and limited to the needs of 35,000 acres, will reclaim and irrigate the same. The waters available under this right and priority shall be divided and distributed to the lands of the Florence-Casa Grande Project as decreed and provided in subdivision (3) of this Article.

(2) The right, on behalf of the Apache and other Indians of the San Carlos Indian Reservation, their descendants, successors and assigns, to divert 6,000 acre feet of the waters of the Gila River, during each irrigation season, from the natural flow in said river at diversion points on said river within said reservation—or above the eastern boundary thereof under such rights of way as may now exist or be acquired therefor; due measures being taken to avoid injuries to other water users by said last mentioned diversions,—as of a date of priority of the year 1846 and to the extent that such waters are available under said priority—at a rate of diversion not exceeding 12.5 cubic feet per second at any time during such season, for the reclamation and irrigation of 1000 acres of the irrigable lands within

the said reservation (or in part or wholly within the valley of the Gila River above the eastern boundary of said Reservation, if lands are there acquired by the United States for that purpose), situated in the County of Graham, State of Arizona, and more particularly described as within said reservation and that portion of the valley of the Gila River above the San Carlos Reservoir and flow line thereof; that said water right, however, if or when sanctioned by law, at the discretion of the Secretary of the Interior and with the consent of the San Carlos Irrigation and Drainage District expressed by its board of directors, may be purchased by or for the benefit of the San Carlos Project and used for said project as other of that project's stream flow right below the San Carlos Reservoir are or may be used under this decree, provided, however, that such right is and shall be treated as a project right to which no individual or individual lands shall have or assert an interest or priority as against any lands given rights in the Priority Schedule; and defendants, Gila Valley Irrigation District, Virden Irrigation District and Franklin Irrigation District through their boards of directors, having offered and agreed to facilitate the aforesaid purchase of said water right so that it may be transferred and used as aforesaid for the benefit of the San Carlos Project as other of that Project's stream flow rights are or may be used below said reservoir under this decree and to pay the United States therefor the sum of Sixty-Two Thousand Five Hundred (\$62,500.00) Dollars, said payments to be made by each of

said Districts, in the proportion that the number of acres of land in said district decreed water rights herein bears to the whole number of acres of land in said three districts' so decreed water rights, and to pay said sum within two years from the acceptance of said offer, if said offer shall be accepted within five years from the date of this decree. Said offer, however, to be considered as made by said districts only when all requirements of Arizona law with regard to making binding offers of such a character shall have been complied with, it is hereby decreed that if said offer is made and accepted at said purchase price sum or at any other sum agreed upon by the said three districts and the United States, the said water right shall be transferred as aforesaid for the benefit of the San Carlos Project, but, in no event shall be used or usable or be asserted as against the lands given rights in the Priority Schedule above the San Carlos reservoir on account of which have been paid the full proportionate per acre share of the cost of said purchase.

(3) The right to divert 372,000 acre feet of the waters of the Gila River, during each irrigation season, from the natural flow in said stream at the Ashurst-Hayden and Sacaton diversion dams, as of the date of priority of 1916, and to the extent that such waters are available under said priority—at a total rate of diversion not exceeding 775 cubic feet per second at any time during such season, for the reclamation and irrigation of the 62,000 acres of the irrigable lands of the so-called

Florence-Casa Grande Project, or its equivalent, more particularly described as follows:

- (a) The aforesaid Indian allotments now or hereafter made on the said Indian Reservation, and the said administrative area, amounting in the aggregate to 50,546 acres to the extent that thirty-five sixty-seconds of the herein described water right, which is sufficient for and limited by the needs of 35,000 acres, will reclaim and irrigate the same.
- . . .

That in accord with the 'Agreement of Land Owners to Induce the Secretary of the Interior to Undertake the Florence-Casa Grande Irrigation Project, etc.' entered into between the owners of said privately owned lands and the United States, it is hereby further specifically ordered, adjudged and decreed that suitable devices for measuring the flow of water available and susceptible of being diverted by the aforesaid dam or dams to the canals of the said Florence-Casa Grande Project (now a part of the San Carlos Project system) shall be maintained and daily or more frequent measurements of said flow shall be made; that the first 300 cubic feet per second or less of water flowing in the river at the said dam or dams, available as a whole under the several rights and priorities of plaintiff, including its immemorial right described and set up in subdivision 1 of this article and the so-called rights by

purchase, and susceptible of being diverted for the said project, shall be divided and distributed, less deductions for project canal losses as hereinafter provided, sixty and six-tenths per centum thereof to the Indian lands of said project and thirty-nine and four-tenths per centum to the White lands thereof; that of the next 300 second-feet of water or less thus flowing and available, less deductions on account of losses as aforesaid, fifty-one and seven-tenths per centum thereof shall be apportioned to the said Indian lands, and forty-eight and three-tenths per centum thereof to White lands; that all water available as aforesaid in excess of said 600 second-feet shall be divided, less deductions on account of losses as aforesaid, fifty-six and one-tenth per centum to said Indian lands and to said privately owned lands, forty-three and nine-tenths per centum, except that during periods of high water when it shall be possible and practicable to divert water for the use of the Indian lands within said project, or some of them, by means of the Sacaton Dam, the entire amount of water diverted for the said project by the said Ashurst-Hayden Dam shall be used for the irrigation of privately owned lands and of such of said Indian lands as cannot be adequately supplied from said Sacaton Dam; that furthermore the amounts of water thus apportioned to the White lands within said project shall be distributed to said lands in the following order:

- (a) Certain of said lands to the extent of some 9,752.83 acres together with 790 acres in Sec-

tions 1 and 2, Twp. 5 S., Range 8 E., G. and S. R. B. and M., being identical with those tracts which are described in the Schedules of Rights and Priorities set out under Article V hereof and identified in said article as applying to the so-called rights by purchase of plaintiff, shall have a call upon the waters available under such apportionment in the order of their priorities as set out in said schedule.

- (b) The remainder of said lands, amounting to some 17,247.17 acres, shall have the next three successive calls upon such waters as are available under such apportionment and in the following order :

. . .

- (c) That the Secretary of the Interior or his agents in dividing the waters of the said Florence-Casa Grande Project shall see that the losses of water in the whole system of project canals (now a part of the San Carlos Project System) are shared as equitably as may be to the end that, with respect to such losses, no water right under the project shall enjoy any advantage of location, position or otherwise over any other project water right ; but losses occurring in the Indian and private canals leading from said project canals shall be disregarded in the division of water

hereinabove provided for; and furthermore whenever the quantity of water diverted into the canals of said project shall, in the aggregate, be so small that, after deducting the losses of transmission in the project canals and then dividing the residue between the Indian lands and the lands in private ownership as hereinabove provided for, the share allotted to the Indian rights would be too small to reach the Indian reservation, the Secretary of the Interior, or his agent in charge of said project, shall permit all of said water to be applied to the irrigation of privately owned lands in accordance with their priorities.

(4) The right to divert 603,276 acre feet of the water of the Gila River, during each irrigation season from the natural flow in said stream at the Ashurst-Hayden and Sacaton Dams above described—as of the date of priority of not later than June 7, 1924 (and for the purposes of this decree and for them only as of said date) and to the extent that such waters are available under said priority—at a total rate of diversion not exceeding 1256.5 cubic feet per second at any time during such season, for the reclamation and irrigation of the 100,546 acres of the irrigable lands of the San Carlos Project and for supplying water to the State of Arizona, and towns, villages and municipalities of that state, and federal agencies, as provided in the Act of

March 7th, 1928, and in the so-called Repayment Contract bearing date the 8th of June, 1931, said 100,546 acres of project lands being more particularly described as follows:

- (a) 49,896 acres of land within the Gila River Indian Reservation which have been, or may be allotted to individuals among the Indians thereof (also referred to herein as "Indian Lands"), together with 650 acres within said reservation comprising the School Farm, Agricultural Experiment Station and Administrative Area.
- (b) 50,000 acres of land in private ownership of white persons (also referred to herein as "White Lands"), made up of such White Lands designated to come into the San Carlos Project by order of the Secretary of the Interior of April 25th, 1928, and August 9th, 1934, said designated lands being described as follows:

. . .

(5) The right, as of the date of priority of not later than June 7, 1924,—and for the purposes of this decree and for them only as of said date—to store the waters of the Gila River in the San Carlos Reservoir of the aforesaid San Carlos Project by means of the Coolidge Dam (said Reservoir and Dam being situate within the San Carlos Indian Reservation) to the extent

of the full 1,285,000 acre-feet capacity of said Reservoir at all times when said waters are available above said dam for such storage under the aforesaid priority; and the right in that relation to accomplish and control the release from said reservoir of the waters so stored and thus reduced to ownership, and to conduct the same down the channel of the Gila River to the Ashurst-Hayden and Sacaton diversion dams of the San Carlos Project and there to recapture and divert, and control the diversion of, the same by means of said dams for conveyance in the canals leading therefrom to the above described 100,546 acres of the lands of said Project for the reclamation and irrigation thereof, and for the supplementation of amounts available therefor at said dams from the natural stream flow under plaintiff's rights as same are decreed herein, and for State and Federal purposes under act of March 7, 1928 as hereinbefore described.

(6) The right, as against and only against the parties to this cause, to divert from the Gila River 17,950 acre feet of water,—for the irrigation of 2992.5 acres of Indian lands at the Gila Crossing District on said Reservation—each irrigation season at a rate of diversion not exceeding 37.4 cubic feet per second of time, from the waters occurring or recurring in said river beginning at the point where the Southern Pacific Railway crosses said river in Section 13, Township 3 South, Range 4 East of Gila and Salt River Base and Meridian or between said point and a point one hundred feet above where the Salt River empties into the Gila River,

at the diversion points on said reservation as now or hereafter located, as of the following dates of priority:

For 954 acres of said lands January 1st, 1873.

“ 587 “ “ “ “ “ “, 1876.

“ 660 “ “ “ “ “ “, 1877.

“ 139 “ “ “ “ “ “, 1900.

“ 58.5 “ “ “ “ “ “, 1903.

It is further provided that water rights with the priorities fixed as aforesaid are for the irrigation of said Gila Crossing Indian lands, but subject at all times, to all rights on said Gila River above said point hereinabove described, and provided also that said rights are subject to the right of the San Carlos project, to divert and use return flows, or water otherwise occurring in the river above said point and the right of said project to pump and otherwise interfere with and control the return flow from the lands within said project.

That certain of the foregoing rights, as listed under items (1), (3) and (4) above are inclusive one of the other so that diversions thereunder do not accumulate, and the amounts in acre feet per season and cubic feet per second stated in the 3rd item include those given in the 1st and those stated in the 4th item include those given in the 1st and 3rd; in each instance representing the total diversion allowable under that priority and those prior thereto as described in said items.

VII

That all Indian lands and all white lands now or hereinafter designated by the Secretary of the Interior

as within the San Carlos Project and under said San Carlos Reservoir shall be entitled to share equally in all of the stored and pumped water of said Project in so far as that shall be physically feasible, and said lands shall share equally in all of the water of said Project of every nature as long as the stored and unstored water supply for said Project shall be sufficient for Project needs, and as far as that shall be physically feasible; but when, through lack of stored and pumped water, there shall be an insufficient supply of water for all of the lands of said Project lying under said reservoir, which condition or fact shall be determined by the Secretary of the Interior or his duly authorized agent, the lands so situated, in addition to their proper share of such stored and pumped waters as may be available to the Project, shall be entitled to and have apportioned to them the unstored flow of the Gila River which is available as a whole, and susceptible of being diverted, for the Indian and White lands of the aforesaid Florence-Casa Grande Project together with the 790 acres in Sec. 1 and 2 T. 5 S., R. 8 E., G. and S. R. B. and M., hereinbefore mentioned, under and in pursuance of the various rights and priorities of the United States decreed herein for said lands, as follows, to-wit: said flow shall be divided between said Indian and White lands and distributed to such lands, whether the same shall be also included in the San Carlos Project or not, in accordance with the apportionment and division ordered and decreed in the third subdivision of Article VI hereof, and any surplus which may remain and be available in said river, under

the priorities of plaintiff, for other lands (beyond those of the Florence-Casa Grande Project and said 790 acres) included in San Carlos Project under the priorities of plaintiff and provisions of this decree, shall first go to such of the Indian Lands in the San Carlos Project, and then in equitable proportion to such of the private and public lands thereof as are not also included in the Florence-Casa Grande Project and said 790 acres.

VIII

That the diversions of water from the Gila River by the so-called upper valleys defendants (parties defendant to whom rights to divert water from the Gila River at points above the San Carlos Reservoir are decreed herein), comprising the defendant canal companies named below, with the parties defendant named in the Priority Schedule and attached tables who are decreed rights through the canals of said companies and are served thereunder, and certain individual parties defendant who are accredited with rights to divert directly from the stream through private ditches, to-wit:

Albert Canal Company, Billingsley Extension Canal Company, Black & McCleskey Canal Company, Brown Canal Company, Colmenero Canal Company, Colvin-Jones Canal Company, Cosper & Windham Canal Company, Cosper & Windham Extension Canal Company (Under contract whereby Cosper & Windham Canal Company makes actu-

al diversion) Curtis Canal Company, Dodge-Nevada Canal Company, Duncan Canal Company, Fort Thomas Consolidated Canal Company, Fourness Canal Company, Graham Canal Company, Moddle Canal Company, Montezuma Canal Company, San Jose Canal Company, Sexton Canal Company, Shriver Ditch Company, Smithville Canal Company, Sunflower Canal Company, Sunset Canal Company, Tidwell Canal Company, Union Canal Company, Valley Canal Company, York Canal Company, York Cattle Company;

R. H. Angle, J. H. Brown, T. D. Burton, W. C. Craufurd, J. W. Foote, R. C. Gilleland, J. H. Henderson, C. C. Hester, F. E. Ross, R. Sexton, Laura Short;

and/or their predecessors in interest, for the irrigation of the lands described in said Priority Schedule made part of Article V hereof, since their inception have been made under rights which were and are junior and subject to certain extensive rights of plaintiff to divert the waters of said stream at points below the diversions of said defendants and also below the San Carlos Reservoir, which said rights of plaintiff are set down and referred to in said Priority Schedule, but are further identified and particularly described in Article VI and VII hereof, it being evidenced thereby that the earliest right of plaintiff is prior in time to all and every of the rights of said defendants, and certain of plaintiff's other rights are prior in time to certain of the

rights of said defendants; that, however, plaintiff and said defendants, in recognition of the desirability of making it practicable for said defendants to carry on the irrigation of said upper valley lands to the extent to which the areas to which their said rights apply heretofore have been irrigated and so that the said San Carlos Act shall inure in part to their benefit and this suit may be compromised and settled, have agreed that the following provisions shall be and they are hereby embodied in this decree, which said provisions in turn, and in so far as they affect the other parties in this cause, shall inure to the benefit of and be binding upon them, to-wit:

(2) That on the first day of January of each Calendar year, or as soon thereafter as there is water stored in the San Carlos Reservoir, which is available for release through the gates of the Coolidge Dam for conveyance down the channel of the Gila River and for diversion and use on the lands of the San Carlos Project for the irrigation thereof, then the Water Commissioner, provided for herein, shall, to the extent and within the limitations hereinafter stated, apportion for the ensuing irrigation year to said defendants from the natural flow of the Gila River an amount of water equal to the above described available storage, and shall permit the diversion of said amount of water from said stream into the canals of said defendants for the irrigation of said upper valleys lands in disregard of the aforesaid prior rights of plaintiff used on lands below said reservoir; the diversion of said amount of water

by said defendants to be in accord with the priorities as between themselves stated in said Priority Schedule and for the irrigation of the lands covered by the rights accredited to said defendants in said Priority Schedule and the quantity of water permitted to be taken by said defendants in disregard of prior rights of the United States below is in addition to and not exclusive of the rights of said defendants to take from the stream in the regular order of their priorities as shown by the Priority Schedule, but of course within the duty of the water limitations of this decree; that if and when at any time or from time to time in any year, water shall flow into said reservoir after said date of first apportionment and shall be stored there and become added to the available stored water in said reservoir, the said commissioner shall make further and additional apportionments to said defendants of the natural flow of said stream as the same is available at the diversion points of said defendants, which said apportionments shall in turn correspond with and be equivalent in quantity to the amount of such accessions or newly available stored water supply; that in calculating apportionments of the stored water supply the Water Commissioner shall make appropriate deductions for losses for evaporation, seepage or otherwise that may be suffered between the time of the apportionment and that of the diversion of a corresponding quantity of water from the stream; that such apportionments, corresponding with net accessions during each annual period after first apportionment, shall be made by said Water Commis-

sioner at least as frequently as once per calendar month (provided accessions to stored supply have occurred during that period) and at such more frequent intervals as the conditions in his judgment may demand—his decisions in these regards to be subject to summary review by the Court as provided in Article XII hereof—and said Water Commissioner shall see to it that his said apportionments, when made, forthwith shall be placed of record herein and so posted or published as to inform all interested parties in that regard with reasonable promptness and despatch; it being herein explicitly provided that no apportionment or apportionments, made during any calendar year, shall carry over or be available in any manner for the succeeding year; that the diversions made by said defendants of the natural flow of the Gila River thus apportioned to them in disregard of the said prior rights of plaintiff shall be regulated by the Water Commissioner (under the authority and powers given him by this decree and/or by such further orders of the Court as may be made in that relation) in accord with the rights and priorities accredited to each of said defendants in said Priority Schedule, provided always that such diversions shall be limited to the amount of water then apportioned, as aforesaid, and in any event, during each irrigation season, do not and shall not exceed the total amount of water called for under the right accredited in said Priority Schedule to any given defendant, namely; 6 acre feet per acre for the irrigation season as defined in Article V hereof; and provided further that the drafts

on the stream by the upper valleys defendants shall be limited to a seasonal year diversion which will result in an actual consumptive use from the stream of not to exceed 120,000 acre feet of water; said consumptive use made in any seasonal year shall be determined by adding the recorded flows at a gauging station located in the Gila River at Red Rock Box Canyon above the heading of the Sunset Canal in New Mexico and a gauging station located in the San Francisco River immediately above its confluence with the Gila River and deducting from said sum the recorded flows at a gauging station located on the Southern Pacific Railway bridge crossing the Gila River near Calva, Arizona; and the Water Commissioner shall determine what diversions are permissible and reduce diversions in the inverse order of their priorities when and to the extent necessary to accomplish the aforesaid result. The aforesaid measurements shall include the whole flow of the stream, including floods, at the three points of measurement, and no allowance shall be made for accretions or additions to the flow between the point of measurement at Red Rock Box Canyon, and the confluence of the Gila and San Francisco Rivers, and in turn between the confluence of the Gila and San Francisco Rivers, and the aforesaid gauging station at the Southern Pacific Railway bridge. Said method of measurement is adopted as sufficiently accurate for practical purposes and as better suited for administering this decree than any more refined method of determining actual consumptive use.

(3) Upon agreement made by the owner of any right set forth in the Priority Schedule for land in the Safford Valley water may be diverted by the owner of land in the Duncan Valley within the duty of water in this decree set forth and within the apportionment of water for said Duncan Valley land in disregard of such Safford Valley right or rights, and that such waiver shall in no way deprive the Safford Valley lands thus waiving of their full apportionment of water herein provided for based on water stored in the San Carlos Reservoir or their full right to take from the stream, in accordance with their priority and within the duty of water fixed by the decree as against water rights of the United States held on account of the San Carlos Project, but the right of the United States to insist upon its priorities as defined and modified herein as against Duncan Valley Lands shall not be abridged by this provision.

(4) That water released at the will of the plaintiff and for the purposes of the plaintiff from the San Carlos Reservoir at any time after the date of this decree other than for the proper irrigation of 80,000 acres of land or its equivalent in the San Carlos Project, shall be considered as stored in the San Carlos Reservoir at and after the date of such releases, and available as a basis for the above described apportionment of the natural flow to said defendants as it would be if such withdrawals had never been made.

(5) PROVIDED ALWAYS, that if by reason of lack of available storage in the San Carlos Reservoir

no apportionment of the natural flow of said river is or can be made available to said defendants, then the diversions of said defendants, of or as soon as apportionments previously made to them have been consumed, shall no longer be made in disregard of the prior rights of plaintiff below said San Carlos Reservoir, but shall instead be made under and in accord with the rights and priorities set down in Article V, and the Priority Schedule made part hereof, and Article VI of this decree to-wit: in accord with their several priorities as same are set down in said Priority Schedule and subject to the prior rights of plaintiff as same are referred to therein and further described in Article VI of this decree.

IX

(1) That the defendant Kennecott Copper Corporation shall be entitled, as of the dates of priority set down in the Priority Schedule made part of Article V hereof, for industrial, municipal, domestic and related beneficial purposes, to divert from the underground waters of the Gila River by means of its pumps, as same are or may be located within the lands described in said Priority Schedule under the heading "Point of Diversion," during the annual period beginning January 1st of each year, the amounts of water stated in said schedule, at the rate of diversion in cubic feet per second there given; subject, however, to the proviso that the total amount of water diverted and maximum rate of diversion, under the rights for such

purposes accredited to said defendant in said Priority Schedule as of the priority dates of 1878, 1879, 1880, 1884, 1885, 1887, 1890, 1895, 1906, 1908, and 1909, shall not exceed the quantity of water in acre feet per annum or rate of diversion in cubic feet per second stated for the right of 1909, to wit: 16,221 acre feet and 22.22 cubic feet per second; That the rights for industrial, municipal, domestic and related purposes accredited to said defendant as of the dates of priority named below were first initiated, and thereafter perfected, by the diversion and application of the waters of the Gila River, through canals leading from the stream, to the irrigation of those certain acreages of the lands described below which are set down opposite said dates of priority, which said dates respectively represent the year in which said acreages were first irrigated, to-wit:

That the use for irrigation under said rights, when the pumps and plant of said defendant were put in operation in the year 1909, was changed and transposed into uses for industrial, municipal, domestic and related purposes, and the waters called for under said rights and priorities, or so much thereof as was available, since have been diverted from the stream or the underground waters thereof by means of the pumps of said defendant and continuously and beneficially applied to said purposes;

(2) That the requirements of said defendant each year for the above described purposes demand that it divert from the underground waters of the Gila River, in so far as same can be made available in that relation,

at the continuous rate of ten thousand gallons per minute, or 22.22 cubic feet per second; same being equivalent by volume measurement to a maximum of 16,221 acre feet per annum; that prior to the construction of the San Carlos Reservoir and the storage of water therein the natural flow of the Gila River at and/or in the vicinity of the reduction plant and pumps of said defendant maintained an underground water plane, which when pumped from to meet the said requirements of defendant, had averaged an approximate minimum elevation, as gauged at said defendant's test well at that place, of 1920 feet above sea level (Nevada Consolidated Copper Company datum) and an approximate maximum elevation of 1930 feet above sea level (datum idem); that said diversions by said defendant then were, and since to the extent undertaken have been, made under rights which were and are junior and subject to certain extensive rights of plaintiff to divert the waters of the Gila River at points below the diversions of said defendant, and also below the San Carlos Reservoir, which said rights of plaintiff are set down and referred to in Article V hereof and the Priority Schedule included therein, and further defined in Article VI and VII hereof, it being evidenced hereby that the early right of plaintiff is prior in time to all and every of the rights of said defendant and certain of plaintiff's other rights are prior in time to certain of said defendant's rights and thereby are credited with dates of priority earlier than those of said defendant; that, however, plaintiff and defendant by way of consent hereto,

in recognition of the desirability of making it practicable for said defendant to continue and further carry on its operations to the extent of its aforesaid requirements and so that this suit may be compromised and settled, have agreed that the following provisions shall be embodied in this decree, which said provisions in turn, and in so far as they affect the other parties in this cause, shall inure to the benefit of and be binding upon them, to-wit:

(3) That said defendant shall be entitled to divert, by means of its said pumps as they now exist or may be replaced, so much of the underground waters of the Gila River as may be available at its said pumps and as will meet its said requirements—but not to exceed the amount of 16,221 acre feet during each annual period reckoning from January 1st of each year as aforesaid, and limited to a maximum rate of diversion of 10,000 gallons per minute, viz. 22.22 cubic feet per second—in disregard of the said prior diversions rights of plaintiff below said San Carlos Reservoir as same are set out and defined in this decree as aforesaid; that if during those periods when no appreciable releases of water from the San Carlos Reservoir are being made into the channel below the Coolidge Dam, the said diversions of defendant by means of said pumps (limited to the amounts required for beneficial application to the above described industrial, municipal, domestic and related purposes and in any event to the said 16,221 acre feet per year and 22.22 cubic feet per second) shall cause the pumping water plane to fall below 1920 feet above sea

level, as gauged at said test well of defendant (Nevada Consolidated Copper Company datum), or some other mutually agreed upon point and datum, then, if there is any natural flow in the Gila River at the point where said stream enters the San Carlos Reservoir, so much thereof (or so much as is available if the amount is insufficient) as will bring the level of said pumping water plane, as gauged at said test well of defendant, or other point aforesaid, to the average of the approximate maximum and minimum elevations aforesaid to wit: 1925 feet above sea level (datum idem), will be allowed to flow through said reservoir into the channel below—if the storage level in said reservoir is high enough physically to permit its release through the Coolidge Dam—said operations to be of simultaneous character in that releases through said Coolidge Dam, equivalent to the natural flow entering the reservoir or such portion thereof as may be sufficient for the above described purpose, shall be made forthwith when it is determined (mutually by the plaintiff and defendant, or in case of disagreement by the Water Master, whose decision may be reviewed as provided in Article XII hereof) that the pumping water plane, under the conditions above described, has fallen below the 1920 foot level aforesaid; that such releases of natural flow through the Coolidge Dam shall be accomplished so as to make the most practical and workmanlike use of the amount available for the purposes thereof, taking into consideration the vital necessity of avoiding in so far as possible the waste of water into the stream below the

gravels in which the pumping water plane is being maintained;

(4) That the diversions of water from the Gila River by said defendant and its predecessors in interest for the irrigation of the lands described in the Priority Schedule for which said defendant is accredited rights for irrigation as of the dates of priority of 1908, 1916, and 1926, since their inception have been made under rights which were and are junior and subject to those certain and extensive rights of plaintiff to divert the waters of said stream at points below the said diversions of defendant; which said rights of plaintiff are set down and referred to in Article V hereof and the Priority Schedule included therein and are further defined in Article VI and VII hereof, it being evidenced thereby that the early right of plaintiff is prior in time to all and every of the rights of said defendant and certain of plaintiff's other rights are prior in time to certain of said defendant's rights, and thereby are accredited with priorities which are earlier than the aforesaid rights of defendant; that, however, plaintiff and defendant, by way of consent hereto and in recognition of the desirability of making it practicable, in so far as possible, for said defendant to carry on the irrigation of its said lands to the extent of the acreages to which its said rights of 1908, 1916 and 1926 apply, and so that this suit may be compromised and settled, have agreed that the following provisions shall be embodied in this decree, which said provisions in turn, and in so far as they affect the other parties in this cause,

shall inure to the benefit of and be binding upon them, to-wit:

(5) That when, under the rule and method of apportionment stated in Article VIII of this decree, there is apportioned to the so-called upper valleys water users amounts of water from the natural flow of the Gila River corresponding with the available storage in the San Carlos Reservoir, then there also shall be apportioned to the defendant Kennecott Copper Corporation, from the natural flow of said river as hereinafter defined, for the irrigation of its said lands, an amount of water per acre thereof corresponding with the amount per acre apportioned to said upper valleys as aforesaid; and thereupon, said defendant shall be entitled to divert—in disregard of the said prior diversion rights of plaintiff below as same are set out and defined in this decree as aforesaid—at the points of diversions and by means of the ditches ascribed to it in the Priority Schedule, so much of the natural flow of the Gila River, limited always to the amount of water then apportioned to it as aforesaid, as can be beneficially applied to the irrigation of the lands to which said rights apply; said diversions as of course to be limited in any event to the amounts of water in acre feet per irrigation season and rates of diversion in cubic feet per second stated for said rights in the Priority Schedule; that in as much as the waters flowing in the Gila River at defendant's said points of diversion, during a great portion of the irrigation season, will be made up in large measure of stored water which has

been released from the San Carlos Reservoir and is being piloted down the stream channel to the diversion dams and distributing canals of the San Carlos Project, the natural flow available as aforesaid to said defendant, under the limitations of said apportionment, shall be gauged by and deemed to correspond with the natural flow of the Gila River and San Carlos River at the points where said streams enter the San Carlos Reservoir, plus such contributions thereto between the Coolidge Dam and said diversion points of defendant as may occur, but subject to such drafts upon such total as may be made by owners of rights of diversion under this decree prior to said rights of defendant (if any there are) between said Coolidge Dam and said diversion points of defendant.

(6) PROVIDED ALWAYS, that the foregoing provisions of this Article IX are hereby explicitly made subject to the proviso that whenever under Article VIII hereof, by reason of lack of available storage in the San Carlos Reservoir and the consumption of previous apportionments thereunder, no apportionment of the natural flow of said river is or can be made available to the so-called upper valleys defendants in disregard of the prior rights of plaintiff below said reservoir, and therefore diversions by said defendants and plaintiff are required to be made under and in accord with the rights and priorities set down in Article V (and the Priority Schedule therein) and VI of the decree, then the diversions of defendant, as against all the other parties in this cause, whether for industrial, municipal,

domestic and related purposes as described in subdivisions (1) to (3) above—or for irrigation as described in subdivisions (4) and (5) if or when its apportionment in that relation also has been consumed—shall be subject to and be made in accord with its priorities as same are stated in the Priority Schedule and not otherwise, saving and excepting only that its diversions for said industrial, municipal, domestic and related purposes as against plaintiff's prior rights of diversion below shall still be regulated and controlled as provided in subdivisions (2) and (3) of this Article; subject to the further proviso, however, that the natural flow of the Gila River as measured where it enters the San Carlos Reservoir, or drafts upon it in conformity with priorities against later rights above, will not be available in any event below said reservoir unless the storage level therein is sufficiently high to permit its release through the Coolidge Dam. It is further provided that the pumped diversions of said defendant when being made under subdivisions (2) and (3) of this Article, at times of greatest peak loads, may exceed by 10% the rate of 22.22 cubic feet per second stated above, if water therefor is available at said pumps, but that the total diversions for any year, January 1st to December 31st inclusive) in such event shall still be limited to 16,221 acre feet.

X

(1) That the diversions of water from the Gila River by defendants Joseph J. Anderson, Grady L.

Herring and T. H. B. Glasspie, and their predecessors in interest for the irrigation of the lands described in the Priority Schedule made part of Article V hereof, for which said defendants are accredited rights for irrigation as of the dates of priority named in said schedule, since their inception have been made under rights which were and are junior and subject to those certain and extensive rights of plaintiff to divert the waters of said stream at points below the said diversions of defendants; which said rights of plaintiff are set down and referred to in Article V hereof and the Priority Schedule included therein and are further identified in Articles VI and VII hereof, and thereby are accredited with priorities which are earlier than the aforesaid rights of defendants; that, however, plaintiff and said defendants, by way of consent hereto and in recognition of the desirability of making it practicable in so far as possible for said defendants to carry on the irrigation of their said lands to the extent of the acres to which their said rights apply and so that this suit may be compromised and settled, have agreed that the following provisions shall be embodied in this decree, which said provisions in turn, and in so far as they affect the other parties in this cause, shall inure to the benefit of and be binding upon them, to wit:

(2) That when, under the rule and method of apportionment stated in Article VIII of this decree, there is apportioned to the so-called upper valleys water users amounts of water from the natural flow of the Gila River corresponding with the available storage in

the San Carlos Reservoir, then there also shall be apportioned to said defendants, from the natural flow of said river as hereinafter defined, for the irrigation of their said lands, an amount of water per acre thereof corresponding with the amount per acre apportioned to said upper valley as aforesaid; and thereupon, said defendants shall be entitled to divert—in disregard of the said prior diversion rights of plaintiff below as same are set out and defined in this decree as aforesaid—at the points of diversion and by means of the ditches ascribed to them in the Priority Schedule, so much of the natural flow of the Gila River, limited always to the amount of water then apportioned to them as aforesaid, as can be beneficially applied to the irrigation of the lands to which their said rights apply; said diversions as of course to be limited in any event to the amounts of water in acre feet per irrigation season and rates of diversion in cubic feet per second stated for said rights in the Priority Schedule; that in as much as the waters flowing in the Gila River at defendants' said points of diversion, during a great portion of the irrigation season, will be made up in large measure of stored water which has been released from the San Carlos Reservoir and is being piloted down the stream channel to the diversion dams and distributing canals of the San Carlos Project, the natural flow available as aforesaid to said defendants, under the limitations of said apportionment, shall be gauged by and deemed to correspond with the natural flow of the Gila River at the point where said stream enters the San

Carlos Reservoir, plus such contributions thereto between the Coolidge Dam and said diversion points of defendants as may occur, but subject to such drafts upon such total as may be made by owners of rights of diversion under this decree prior to said rights of defendants (if any there are) between said Coolidge Dam and said diversion points of defendants.

(3) PROVIDED ALWAYS, that the foregoing provisions of this Article X are hereby explicitly made subject to the proviso that whenever under Article VIII hereof, by reason of lack of available storage in the San Carlos Reservoir and the consumption of previous apportionments thereunder, no apportionment of the natural flow of said river is or can be made available to the so-called upper valleys defendants in disregard of the prior rights of plaintiff below said reservoir, and therefore diversions by said defendants and plaintiff are required to be made under and in accord with the rights and priorities set down in Article V (and the Priority Schedule therein) and VI of the Decree, then the diversions of the defendants above named, as against all the other parties in this cause—if or when their apportionment in that relation also has been consumed—shall be subject to and be made in accord with their priorities as same are stated in said Priority Schedule and not otherwise; subject to the further proviso, however, that the natural flow of the Gila River, as measured where it enters the San Carlos Reservoir, will not be available below said reservoir on occasions when the storage level

therein is not sufficiently high to permit its release through the Coolidge Dam.

XI

That the lands within the Gila River watershed for the irrigation of which rights are decreed herein are arid or semi-arid in character and require irrigation in order that crops of value may be produced thereon; that except as herein specifically provided no diversion of water from the natural flow of the stream into any ditch or canal for direct conveyance to the lands shall be permitted as against any of the parties herein except in such amount as shall be actually and reasonably necessary for the beneficial use for which the right of diversion is determined and established by this Decree, to-wit: shall be made only at such times as the water is needed upon their lands and only in such amounts as may be required under the provisions hereof for the number of acres then being irrigated; that in cases where by this Decree water is allowed to be diverted by and through any ditch by the owner thereof for another party, the terms of the contractual relations existing between them are not intended to be determined herein; that wherever the total area under a particular canal is decreed more than one water right, each having the same or different priorities or in its different parts having different rights and priorities, the total area may have used upon it all of its several rights in the order of their priorities, subject only to the requirement that no greater net draft on the stream be made

than if each right in the order of its priority were used only on the particular lands for which it was originally acquired or reserved; that rotation, which is a well known, recognized and effective practice in irrigation administration (constituting in effect the combining of flows allowed to be diverted from a given stream under two or more rights so as to provide for the alternate use of more adequate irrigation heads as between neighboring or other ditches taking from such stream), shall be permitted at all times and shall be required whenever necessary in order to obtain reasonable economies in the use of water, or in order to give to each ditch or water user a more advantageous method of irrigation, providing that such rotation shall not injuriously affect any of the rights determined or allowed by this decree; that the Water Commissioner provided for herein shall arrange for and enforce such rotation, but shall consult with, and endeavor to obtain the agreements of, such water users as in his judgment should resort thereto, and shall embody his action in this regard into such reports as he may make or be required to make to the Court herein; that if no valid objection thereto be made by other water users, an owner of any right decreed herein, when the allowable diversion thereunder in the judgment of the Water Commissioner does not constitute an adequate irrigation head for his lands, may with or without agreement for rotation, when permitted by said Water Commissioner, divert a larger head or flow into his ditch for short periods of time in lieu of the smaller flow allowed to him under his said

right, providing always that such use shall not exceed for the irrigation season the amount in acre-feet herein specified and allowed to be diverted from the stream for his lands; that appropriations and priorities of the same date rank as having rights of the same standing, and as having a simultaneous call upon the stream source in the proportion which said rights, as decreed herein, bear to each other in amounts entitled to be diverted thereunder; that any of the parties to whom rights to water have been decreed herein shall be entitled, in accord with applicable laws and legal principles, to change the point of diversion and the places, means, manner or purpose of the use of the waters to which they are so entitled or of any part thereof, so far as they may do so without injury to the rights of other parties as the same are defined herein.

XII

That a Water Commissioner shall be appointed by this Court to carry out and enforce the provisions of this decree, and the instructions and orders of the Court, and if any proper orders, rules or directions of such Water Commissioner, made in accordance with and for the enforcement of this decree, are disobeyed or disregarded he is hereby empowered and authorized to cut off the water from the ditch then being used by the person so disobeying or disregarding such proper orders, rules or directions; promptly reporting to the Court his said action in such case and the circumstances connected therewith and leading thereto; that when-

ever the necessities of the situation appear to the Court so to require, the Court shall authorize the employment by the Water Commissioner of such person or persons to assist that officer as to the Court may seem necessary to carry out properly the provisions of this decree and the orders of the Court; that the term of employment, expenses and compensation of said Water Commissioner and his assistants, the payment thereof and the means and methods for securing funds with which to pay the same, shall be fixed by orders which the Court may hereafter from time to time make; that any person, feeling aggrieved by any action or order of the Water Commissioner, in writing and under oath, may complain to the Court, after service of a copy of such complaint on the Water Commissioner, and the Court shall promptly review such action or order and make such order as may be proper in the premises; that the owner or owners of each ditch or canal herein authorized to divert water from the natural flow of the Gila River for direct conveyance to and irrigation of lands, unless specifically excused by the Court or Water Commissioner, shall at his own expense install and at all times maintain at any appropriate place at or near the head of said ditch, a reliable and readily operated regulating headgate and a measuring box, flume or other device which may be locked and set in position—the same to be approved by the Water Commissioner—so that the water diverted into said ditch or canal at any and all times may be regulated and measured; that upon failure of any owner or owners to install structures of

the above described character on or before one year from the date of this decree or on or before such different day as the Court or Water Commissioner shall set or determine—after due notice from the Water Commissioner so to do—the said Water Commissioner is herein authorized to cut off diversions of water into said ditch or canal until such devices and structures shall be installed and maintained.

XIII

That each and all of the parties to whom rights to water are decreed in this cause (and the persons, estates, interests and ownerships represented by such thereof as are sued in a representative capacity herein), their assigns and successors in interest, servants, agents, attorneys and all persons claiming by, through or under them and their successors, are hereby forever enjoined and restrained from asserting or claiming—as against any of the parties herein, their assigns or successors, or their rights as decreed herein—any right, title or interest in or to the waters of the Gila River, or any thereof, except the rights specified, determined and allowed by this decree, and each and all thereof are hereby perpetually restrained and enjoined from diverting, taking or interfering in any way with the waters of the Gila River or any part thereof, so as in any manner to prevent or interfere with the diversion, use or enjoyment of said waters of the Gila River or any part thereof, so as in any manner to prevent or in-

terfere with the diversion, use or enjoyment of said waters by the owners of prior or superior rights therein as defined and established by this Decree; that nothing herein shall prejudice the rights of any of the parties hereto or of their grantees, assigns or successors in interest, under any transfer or legal succession in interest after the commencement of this action, to any of the rights hereby adjudicated; that except as hereinbefore mentioned or otherwise stated, the provisions of this Decree shall bind, and inure to the benefit of, the grantees, assigns and successors in interest of the owners of rights and parties hereto, whether substituted as parties or appearing in this case or named herein or not; that the several parties to this suit shall pay their own costs in this action as directly incurred or authorized by them respectively, provided that any compensation of the Water Commissioner, or amounts shown to be coming to him or the reporter, if any there be, shall be paid in such manner, at such times and by such parties as may be ordered by the Court; that the Court retains jurisdiction hereof for the limited purposes above described, this decree otherwise being deemed a final determination of the issues in this cause and of the rights herein defined.

Done in Open Court this twenty-ninth day of June, 1935.

ALBERT M. SAMES,
Judge.

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

GILA VALLEY IRRIGATION DISTRICT, FRANKLIN IRRIGATION DISTRICT, ROY A. LAYTON, MILTON LINES, WILLIAM WALDROM, ROY D. WILLIAMS, AND J. D. WILKINS, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ARIZONA

BRIEF FOR THE UNITED STATES

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In the United States Circuit Court of Appeals for the Ninth Circuit

No. 9527

GILA VALLEY IRRIGATION DISTRICT, FRANKLIN IRRIGATION DISTRICT, ROY A. LAYTON, MILTON LINES, WILLIAM WALDROM, ROY D. WILLIAMS, AND J. D. WILKINS, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ARIZONA

BRIEF FOR THE UNITED STATES

OPINION BELOW

The district court did not write an opinion. Its findings, conclusions and order denying appellants' petition appear at R. 26-29.

JURISDICTION

The United States, pursuant to section 24 of the Judicial Code as amended, 28 U. S. C. sec. 41 (1), instituted the original proceeding in this case to obtain an adjudication of its water rights in the Gila River. The original proceeding was terminated by a consent decree

entered June 29, 1935.¹ Article XII of the decree provided for the appointment of a water commissioner and further provided (Decree 112; Appendix 42)—

that any person, feeling aggrieved by any action or order of the Water Commissioner, * * * may complain to the Court * * * and the Court shall promptly review such action or order and make such order as may be proper in the premises.

On July 5, 1939, appellants filed a petition asking the court to review certain actions of the water commissioner (R. 2-9). On January 22, 1940, the district court entered an order denying the relief requested in the petition (R. 26-29). Notice of appeal was filed March 14, 1940 (R. 29-30). The jurisdiction of this Court is invoked under section 128 of the Judicial Code, as amended, 28 U. S. C. sec. 225 (a).

QUESTION PRESENTED

Whether the district court erred in holding that the decree of June 29, 1935, is unambiguous and that the actions of the water commissioner in apportioning water to the appellants were in accordance with the provisions of the decree.

¹ This decree has not been printed as part of the record but copies prepared by the Government Printing Office have been filed with the Clerk (R. 115-116). In addition, the appellants have printed portions of the decree as an appendix to their brief. For the convenience of the Court this brief will give page references both to the original copies which will be cited as "Decree" and to the appellants' brief which will be cited as "Appendix."

STATEMENT

The United States, on its own behalf and on behalf of the Pima and Apache Indians, instituted the original proceeding in this case to obtain an adjudication of its water rights in the Gila River. By Article XII of its final decree of June 29, 1935, the district court retained jurisdiction for the purpose of reviewing the actions of the water commissioner appointed to enforce the provisions of the decree (Decree 112; Appendix 42). The present appeal arises out of an effort made by the appellants, who were defendants in the original proceedings, to establish that the water commissioner was improperly administering the decree in certain respects (R. 2-8). The court below denied the appellants the relief which they requested and upheld the actions of the water commissioner (R. 26-29). The court stated that the pertinent provisions of the 1935 decree are "clear and unambiguous" and that the water commissioner was acting "in accordance with the * * * decree" (R. 27, 28). The essential facts are as follows:

The Gila River and the San Carlos Reservoir.—The Gila River flows in a general westerly direction from its source in New Mexico, through Arizona to its confluence with the Colorado River at Yuma in western Arizona. Pursuant to the Act of June 7, 1924, c. 288, 43 Stat. 475, the United States constructed a dam in the vicinity of San Carlos, Arizona. This dam, which is known as the Coolidge Dam, impounds water of the Gila River in the San Carlos Reservoir.

The lands embraced within the appellant irrigation districts, and owned by the individual appellants, are located in the Gila River valley in eastern Arizona, and are upstream from the San Carlos Reservoir. Appellants thus designate themselves as the "Upper Valley Users" (Br. 2).

Downstream from the San Carlos Reservoir is the Government's San Carlos Project, which irrigates a large area of Indian lands and lands owned by whites.

The original proceeding and the decree of June 29, 1935.—As has been stated, the purpose of the original proceeding which was brought by the Government in 1925 was to obtain an adjudication of the rights of the various parties to use the waters of the Gila River. The United States on its own behalf and on behalf of certain Indians claimed the right to use a considerable quantity of water on lands located downstream from the San Carlos Reservoir. The various irrigation districts and individuals who claimed the right to divert water above the reservoir were named as defendants. The parties negotiated a settlement which they agreed "should be embodied in and confirmed and made effective" by a court decree (Decree 6; Appendix 1). Such a decree was entered on June 29, 1935 (Decree 113; Appendix 44).

The decree adjudicates to the United States extensive rights to divert the natural flow of the river at points which with one exception are below the reservoir (Arts. V, VI: Decree 12-105; Appendix 2-18). One such right, decreed to the United States on behalf of the Pima Indians of the Gila River Reservation for

the irrigation of 35,000 acres, is of immemorial priority (Art. VI (1): Decree 86; Appendix 8). It is, therefore, prior to all other rights on the river. Another right, decreed to the United States on behalf of the Apache Indians of the San Carlos Reservation for the irrigation of 1,000 acres, has a priority of 1846 (Art. VI (2): Decree 86; Appendix 9).² Still other rights adjudicated to the Government were acquired by purchase on behalf of white landowners within the San Carlos Project. In fact, all rights having priorities of between 1846 and 1872 are declared to be in the United States (Decree 14-15). The United States is also determined to have acquired extensive rights subsequent to 1872 which were prior to many of the rights of the upper valley users (Arts. V, VI (3)-(6): Decree 15-72, 86-105; Appendix 5-6, 11-18). In addition to the foregoing rights to divert the *natural flow*, the United States is separately decreed the right to *store* water in the San Carlos Reservoir as of June 7, 1924 (Art. VI (5): Decree 72, 105; Appendix 16).

The rights of all parties to the decree are adjudicated and set out in Article V (Decree 14-72). Certain of

² The early priorities decreed to the United States on behalf of the Pima and Apache Indians were claimed by the United States by virtue of actual prior appropriations and under the principle established in *Winters v. United States*, 207 U. S. 564 (1908), and followed in *Skeem v. United States*, 273 Fed. 93 (C. C. A. 9, 1921); *United States v. Walker River Irrigation District*, 104 F. 2d 334 (C. C. A. 9, 1939); *United States v. Hibner*, 27 F. 2d 909, 911 (D. Idaho 1928); *Anderson v. Spear-Morgan Livestock Co.*, 107 Mont. 18, 25, 79 P. 2d 667 (1938).

the rights declared to be in the United States are further defined in Article VI (Decree 13, 86; Appendix 6, 8).

Article VIII, the interpretation of which is involved in this case, recites by way of preamble (Decree 106; Appendix 20-22): That the diversions of water from the Gila River by the upper valley defendants, "since their inception have been made under rights which were and are junior and subject to certain extensive rights of plaintiff [the United States] to divert the waters * * * at points below the diversions of said defendants and also below the San Carlos Reservoir." That the earliest right of plaintiff is prior to all the rights of defendants, and certain of plaintiff's other rights are prior to certain of defendants' rights. That plaintiff and defendants, recognizing the desirability of making it practicable for the defendants "to carry on the irrigation of said upper valley lands to the extent to which the areas to which their said rights apply heretofore have been irrigated and so that the said San Carlos Act shall inure in part to their benefit and this suit may be compromised and settled," have agreed upon certain provisions which shall be made part of the decree and binding upon the parties.

The first provision thus agreed upon and embodied in the decree (Art. VIII (2): Decree 106; Appendix 22-25) is that on January 1 of each year, or so soon thereafter as water is stored in the San Carlos Reservoir which is available for release through the Coolidge Dam, conveyance down the channel, and diversion and use on the lands of the San Carlos Project, the water commissioner shall apportion for the ensuing irriga-

tion year to the upper valley defendants from the natural flow of the river an amount of water equal to this available storage, and shall permit the upper valley defendants to divert that amount of water from the stream, "in disregard of the aforesaid prior rights of plaintiff used on lands below said reservoir." It is provided that the defendants may divert this quantity of water in addition to their rights to take from the stream in the regular order of their priorities as established in the priority schedule (Art. V).

The decree provides for further apportionments of water from time to time throughout the year, as follows (Art. VIII (2): Decree 106; Appendix 23):

that if and when at any time or from time to time in any year, water *shall flow into said reservoir* after said date of first apportionment *and shall be stored there and become added to the available stored water* in said reservoir, the said commissioner shall make further and additional apportionments to said defendants of the natural flow of said stream as the same is available at the diversion points of said defendants, which said apportionments shall in turn *correspond with and be equivalent in quantity to the amount of such accessions or newly available stored water supply*; that in calculating apportionments of the stored water supply the Water Commissioner shall make appropriate deductions for losses for evaporation, seepage or otherwise that may be suffered between the time of the apportionment and that of the diversion of a corresponding quantity of water from the stream; that such apportionments, corresponding with net accessions during each annual pe-

riod after first apportionment, shall be made by said Water Commissioner at least as frequently as once per calendar month (provided accessions to stored supply have occurred during that period) and at such more frequent intervals as the conditions in his judgment may demand * * *. [Italics supplied.]

The action of the water commissioner.—In order to determine the amount of available stored water at any given time a capacity curve was prepared by making a contour map of the reservoir which shows the amount stored at each elevation of the water surface (R. 16). A continuous record of water surface elevations is maintained by an automatic water stage recorder which produces a graph showing the water surface elevation at all times. Thus, by taking the elevation shown on the graph on January 1 of each year the commissioner computed the amount of water in storage on that day by reference to the capacity curve (R. 16). He then apportioned to the upper valley defendants the right to divert from the natural flow of the stream, in addition to their regular priorities, an amount of water equal to all water then stored in the reservoir and available for release for use by the lower valley users, less deductions for estimated evaporation (R. 6-7, 15-17).

The water commissioner employed the following method in determining the additional apportionments to be made from time to time throughout the year (R. 18, 20):

In order to determine when the water flowing into the reservoir is being stored it must be known

when there has been an increase in the amount of available stored water. There cannot be an increase in the amount of stored water in the reservoir without there being a corresponding rise in the water surface elevation, and it is possible by means of [the] water stage recorder to determine when such increases occur and the amount thereof. The graphs removed from the water stage recorder on the San Carlos reservoir are tabulated and whenever a minimum elevation is reached the time and elevation is noted. As the water is being stored the water surface rises until a maximum elevation is reached and the time and elevation is again noted. By means of these two elevations and the use of the capacity curve the volume of water stored during that period of time can be determined. A record is kept of all such increments of gain.

From the amount of newly available stored water deductions are made for estimated additional evaporation losses which were not included in the first apportionment. These evaporation losses are later computed and proper corrections are made to the amount previously apportioned.

* * * * *

The rights of the plaintiff are set forth in the decree. Certain of these rights are a right to divert the natural flow waters of the Gila River. Inasmuch as natural flow may be defined as the flow produced by nature and that would be there in nature's own condition, the plaintiff has the right to pass the waters flowing in the rivers above the dam through the reservoir to the extent of its priorities, and to use these waters for the irrigation of its lands. Such waters passed through the reservoir as natural flow cannot be

considered an addition to the stored water contents of the reservoir and therefore a like amount of water cannot be apportioned to the upper valley defendants.

However, when the senior rights of the plaintiff are being satisfied from the natural flow available and there is sufficient natural flow waters available to satisfy later priorities, the defendants are entitled to their share of this natural flow on the same basis of priorities as is the plaintiff.

'Appellants' alleged grievances.—Appellants, on their own behalf and on behalf of all other owners of lands within appellant districts who use waters from the Gila River under the 1935 decree, petitioned the district court to review the action of the water commissioner in making apportionments (R. 2). They allege that they are aggrieved (R. 2) and pray that the court order the commissioner to administer the decree in the manner set forth in their petition (R. 8).

Appellants are not in disagreement with the water commissioner's method of apportionment on January 1 (R. 5-7). With respect to the subsequent apportionments, however, they allege (R. 6):

that * * * upon making each additional apportionment to said Upper Valley Users during the period of said year, the said Commissioner should take into account and apportion an additional amount of water *equal to all water flowing into said Reservoir since the date of the last apportionment*, less an estimated allowance for seepage and evaporation and less the amount of water which, by the terms of said decree, must

be delivered to Kennecott Copper Corporation, Joseph J. Anderson, Grady L. Herring and T. H. B. Glasspie.³ [*Italics supplied.*]

They also allege that if the commissioner had made apportionments to the upper valley users in the manner outlined in the petition they would have been entitled to divert from the Gila River approximately one acre-foot more water per year for each acre of land owned by them, than was the case under the apportionments actually made (R. 7-8).

The position of the Government.—The answers of the United States to the petition⁴ deny that the method of apportionment outlined in the petition is the method provided for in the decree (R. 10, 14), allege that the water commissioner has at all times apportioned and authorized the diversion of the waters of the river in accordance with the decree (R. 10-11), and allege that petitioners have received all the water to which they have been entitled (R. 11, 22). The methods which the commissioner has used in making the apportionments are set out in detail. As pointed out above, his method of making the first apportionment (R. 15-17)

³ The Kennecott Copper Corporation and other parties referred to are, like the Government, lower valley users, that is they divert and use the water below the San Carlos Reservoir. These parties, along with the upper valley users, were defendants in the original proceeding and their rights are defined in Articles IX and X of the decree.

⁴ The United States and the water commissioner each filed a separate answer to the petition (R. 10, 12). The court, however, ordered that the answer of the water commissioner be stricken and, by stipulation, that the answer of the water commissioner be adopted as part of the Government's answer (R. 25).

does not differ from the method described in the petition (R. 5-6). His method of making the subsequent apportionments from time to time throughout the year, with which appellants disagree (R. 6-7), is described in the quotation from his answer, *supra*, pp. 8-10.

The action of the district court.—Appellants offered testimony (R. 37, 70, 80, 101) and exhibits (R. 85-100) to show their understanding of the decree at the time it was entered. The Government objected to this offer as being immaterial, in that the decree is unambiguous, and any testimony to explain or change it is inadmissible (R. 34-37, 84, 88, 97, 105). The court sustained the Government's objection throughout, and excluded the evidence (R. 35, 105, 108). In its findings and conclusions it held that the decree is clear and unambiguous (R. 27) and that the water commissioner's method of apportionment is in accordance with the decree (R. 28).

ARGUMENT

I

The decree is unambiguous and clearly provides for the method of apportionment employed by the water commissioner

1. *In making additional apportionments the commissioner must take into consideration only such water as flows into the reservoir and is added to the available stored water.*—On January 1 of each year the water commissioner ascertained the amount of water which was stored in the San Carlos Reservoir and which was capable of being released through the gates of the Cool-

idge Dam ⁵ and conveyed down the channel for diversion and use on the Government's San Carlos Project. He then, after making deductions for estimated evaporation and seepage, apportioned to appellants the right to divert an equal amount of water from the natural flow of the stream at points above the reservoir (R. 15-17). The water thus apportioned was in addition to the rights of the appellants to take from the stream in the regular order of their priorities (Art. VIII (2): Decree 106; Appendix 23).

In making additional apportionments to the appellants during the course of a year the water commissioner took into consideration only such water as flowed into and increased the amount of available storage in the reservoir (R. 17-20). Appellants contend that he should have taken into consideration all water which flowed into the reservoir since the date of the first apportionment (R. 6).

It is the position of the Government, and the district court held, that the decree is unambiguous and clearly provides for the method of apportionment employed by the water commissioner. The controlling provision of the decree is as follows (Art. VIII (2): Decree 106; Appendix 23):

that if and when at any time or from time to time in any year, *water shall flow into said reservoir* after said date of first apportionment *and shall be stored there and become added to*

⁵ There was necessarily a certain amount of water in the reservoir which was at a lower elevation than the outlet gates of the dam. This water, which is known as dead storage, could not be released.

the available stored water in said reservoir, the said commissioner shall make further and additional apportionments to said defendants of the natural flow of said stream as the same is available at the diversion points of said defendants, which said apportionments shall in turn correspond with and be equivalent in quantity to the amount of such accessions or newly available stored water supply. [Italics supplied.]

The foregoing language is manifestly irreconcilable with appellants' assertion that all water flowing into the reservoir is to be made the basis of additional apportionments. Under the decree there can be no additional apportionment unless "water shall flow into said reservoir *and* shall be stored there *and* become added to the available stored water in said reservoir." Appellants' suggested interpretation renders meaningless the two conjunctive clauses. Moreover, there is no accession "or newly available stored water supply" unless there is an increase in the total amount of water stored in the reservoir which can be released through the gates of the dam.

2. *There is no foundation for appellants' contention that all water which flows into the reservoir is to be made the basis of additional apportionments.*—Because the language just discussed is so clear and unambiguous the appellants are forced to take the position that all water that flows into the San Carlos Reservoir is stored there and becomes added to the available stored water, even though the amount of water released from the reservoir has at all times been exactly equal to the amount flowing in. Thus, they state (Br. 27):

Any water running into the reservoir becomes stored water. The lake is several miles in length and it would be impossible to convey the stream running in, through the water then in storage, out of the lake. The mere fact that an equivalent amount of water may be withdrawn at the same time as the new waters running in, does not prevent the incoming water from being stored water. It is there, stored in the reservoir, and is added to the water already stored there, and if conditions are such as to make the water available for release, it becomes added to the available stored water in said reservoir.

To put it a little differently, the contention is that all water flowing in is being stored because the Government, while releasing exactly the same quantity, is not releasing precisely the same molecules. This highly refined argument ignores familiar principles of water law and is contrary to the provisions of the decree in this case.

It is well settled that all the water which flows into a reservoir constructed in the channel of a stream does not become stored there. *Nepesta D. & R. Co. v. Espinosa*, 73 Colo. 302, 215 Pac. 141 (1923); *Donich v. Johnson*, 77 Mont. 229, 257, 250 Pac. 963, 972 (1926). The owner must allow sufficient natural flow to pass through his reservoir to satisfy the prior rights of downstream appropriators. *Donich v. Johnson*, 77 Mont. 229, 240-241, 250 Pac. 963 (1926); Harding, *Water Rights for Irrigation* (1936) pp. 33, 161. Water may be stored in a reservoir only when the flow of the stream carries more than enough water to fill the de-

mand of direct flow appropriators having superior rights. A reservoir owner may himself own a right to divert water directly from natural flow at a point below his reservoir (as does the United States under Articles V and VI (1), (3), (4), (6): Decree 14-105; Appendix 8-9, 11-18), yet this right of direct diversion from natural flow is distinct from his right to store water (decreed to the United States in Articles V and VI (5): Decree 72, 105; Appendix 16). The United States, with its storage right as of June 7, 1924, cannot store water available to it under its natural flow priorities. *Greeley Co. v. Farmer's Pawnee Co.*, 58 Colo. 462, 146 Pac. 247 (1915); Harding, *Water Rights for Irrigation*, pp. 161-162. On the other hand, the right of direct diversion from natural flow is not impaired by the fact that the water to satisfy that right has passed through a storage reservoir somewhere on its course down the stream. *Nepesta D. & R. Co. v. Espinosa*, 73 Colo. 302, 215 Pac. 141 (1923).

It is appellants' position that the United States does not have the right to pass the natural flow of the stream through the reservoir to satisfy its priorities. If, as they contend, all water flowing into the reservoir becomes stored there it necessarily follows that all water released from the reservoir is stored water. This is contrary to the decree which draws a careful distinction between the right of the United States to store water, and the right of the United States and other parties to divert natural flow. Article V adjudicates and sets out the priorities of all parties, including the United States, and provides (Decree 12; Appendix 2-3) that each owner,

is entitled * * * as of the date of [his] priority to divert *from the natural flow of the stream* * * * a total amount of water not exceeding 6 acre-feet per each acre of said lands. [Italics supplied.]

Article V also provides (Decree 13; Appendix 6):

the right of the United States, as of the year 1924, to *store* the waters of the Gila River in the San Carlos Reservoir, which is specifically defined in Article VI * * * *is of different character than the rights directly to divert from the natural flow of the stream* * * * [Italics supplied.]

The natural flow rights of the United States are further defined in Article VI (1), (2), (3), (4), and (6) (Decree 86-105; Appendix 8-18); the storage right is further described in Article VI (5) (Decree 105; Appendix 16) and this paragraph provides, in addition, for:

the right in that relation to accomplish and control the release from said reservoir of the waters so *stored* and thus reduced to ownership, and to conduct the same down the channel of the Gila River to the Ashurst-Hayden and Sacaton diversion dams of the San Carlos Project and there to *recapture and divert* * * * the same * * * for the *supplementation* of amounts available therefor at said dams from the *natural stream flow* under plaintiff's rights as same are decreed herein. [Italics supplied.]

This same distinction is made in Articles IX and X (Decree 108-111; Appendix 27-39) where certain defendants below the reservoir are decreed the right to divert quantities of natural flow in disregard of the

plaintiff's priorities. For example, paragraph (2) of Article X (Decree 111; Appendix 37-38) provides:

that inasmuch as the waters flowing in the Gila River at defendants' said points of diversion, during a great portion of the irrigation season, will be made up in large measure of *stored water* which has been released from the San Carlos Reservoir and is being piloted down the stream channel to the diversion dams and distributing canals of the San Carlos Project, the *natural flow* available as aforesaid to said defendants, under the limitations of said apportionment, shall be gauged by and deemed to correspond with the *natural flow* of the Gila River at the point where said stream enters the San Carlos Reservoir, * * * [Italics supplied.]

Thus, the very language of the decree by drawing a distinction between natural flow and stored water conclusively establishes that the Government has the right to pass the natural flow of the stream through the reservoir to satisfy its priorities. It necessarily follows that all water which flows into the reservoir does not become stored water.

It is submitted that the plain and unambiguous language of the decree requires the method of apportionment employed by the water commissioner.

II

The other matters upon which appellants rely do not support their contention that the decree is ambiguous

As stated above (pp. 14-15), appellants are forced to pitch their entire case on the proposition that all of the water which flows into the San Carlos Reservoir is stored there. It has been shown in Point I that the

plain and unambiguous language of Article VIII (2) completely refutes their contention. However, before concluding, the Government wishes to answer certain other arguments advanced by appellants.

They suggest (Br. 18-19) that the binding force of the decree in the instant case is somewhat lessened by the fact it was entered with the consent of the parties. However, it is settled that a consent decree has "at least the same force and effect as judgments rendered judicially upon contest or trial." *Pick Mfg. Co. v. General Motors Corporation*, 80 F. 2d 639, 641 (C. C. A. 7, 1935); *Bullard v. Commissioner of Internal Revenue*, 90 F. 2d 144, 147 (C. C. A. 7, 1937); *Utah Power & Light Co. v. United States*, 70 Ct. Cls. 391, 397-400, 42 F. 2d 304, 308-309 (1930). Even assuming that appellants are right in their contention that a consent decree is to be interpreted in the same manner as a contract, they recognize (Br. 14-15) that evidence to explain its meaning can only be considered if the decree is ambiguous.⁶ Accordingly, they endeavor to create an ambiguity. The several matters upon which they rely will be separately discussed:

⁶ *Andrews v. St. Louis Joint Stock Land Bank*, 107 F. 2d 462, 467-468 (C. C. A. 8, 1939); *National Pigments & Chemical Co. v. C. K. Williams & Co.*, 94 F. 2d 792 (C. C. A. 8, 1938). The case of *Reed v. Insurance Co.*, 95 U. S. 23, 30 (1877), cited by appellants (Br. 19) is not to the contrary, because, as stated in *Union Selling Co. v. Jones*, 128 Fed. 672, 675 (C. C. A. 8, 1904):

"If there is uncertainty or ambiguity in the terms employed, the actual condition of things, and the position in which the parties stood at the time of making the contract, may be shown for the purpose of ascertaining the meaning of its terms. *Reed v. Insurance Co.*, 95 U. S. 23, 30, 24 L. Ed. 348; *Phelps v. Clasen*, 1 Woolw. 206, 212, 19 Fed. Cas. 445, No. 11074. That which may

1. *Paragraph 1 of Article VIII does not support appellants' contention.*—Appellants' theory appears to be that, although the decree determined the priority of the United States to large quantities of water for the irrigation of Indian lands, yet paragraph 1 of Article VIII (Decree 106; Appendix 20–22) is in the nature of a contract that the upper valley defendants should be entitled, whatever the Indian priorities may be, to continue to use the waters of the river to the same extent as they have used them before the suit was brought (Br. 18, 20–22, 44). If this were true, the United States would have gained nothing through the years of effort and large expenditures of money devoted to securing the decree. Nor can any cogent reason be given why the decree should describe the priorities of the United States so fully as it does in Articles V and VI, if in fact they were null.

A reading of the decree in its entirety discloses no basis for this theory of the appellants. Of the thirteen articles, numbers I, II, III, IV, VII, XI, XII, and XIII are not related to the question presented by this appeal. Articles V and VI adjudicate in detail all the priorities of the parties involved in the suit. They adjudicate to the United States extensive direct diversion rights and the separate right to store waters of the river. Articles VIII, IX, and X, however, are different in nature, in that they embody consensual

be shown is frequently spoken of as the surrounding circumstances, *but it does not include the prior representations, proposals, and negotiations of a promissory character leading up to, and superseded by, the written agreement. These cannot be thus engrafted upon it.*" [Italics supplied.]

arrangements as to how the rights decreed in Articles V and VI shall be exercised.

Thus, paragraph 1 of Article VIII recites by way of preamble (Decree 106; Appendix 20-22) :

That the diversions of water from the Gila River by the so-called upper valleys defendants * * * for the irrigation of the lands described in said Priority Schedule made part of Article V hereof, since their inception have been made under rights which were and are junior and subject to certain extensive rights of plaintiff, which * * * are set down and referred to in said Priority Schedule, but are further identified and particularly described in Articles VI and VII hereof * * * that, however, plaintiff and said defendants, in recognition of the *desirability* of making it practicable for said defendants to carry on the irrigation of said upper valley lands to the extent to which the areas to which their said rights apply heretofore have been irrigated and so that the said San Carlos Act *shall enure in part to their benefit* and this suit may be compromised and settled, *have agreed that the following provisions shall be and they are hereby embodied in this decree* * * *. [Italics supplied.]

However, the *terms* of the compromise are set out in paragraphs 2 to 5 (Decree 106-107; Appendix 22-27). These paragraphs have been fully discussed in Point I (pp. 12-18, *supra*) and it is there shown that they require the method of apportionment employed by the water commissioner.

2. *The San Carlos Act neither recognized the rights which appellants claim nor abandoned the rights of the*

Indians.—Appellants quote a portion of the Act of June 7, 1924, c. 288, 43 Stat. 475, and suggest (Br. 16-17) that it constitutes a recognition by Congress that the upper valley users had made lawful appropriations and that the Indians were therefore without an adequate water supply. A reading of the act plainly discloses that it has no such effect. In fact, the report of the chief engineer of the Indian irrigation service, dated November 1, 1915,⁷ which the act incorporates by reference, states (pp. 12, 93, 100) that while the rights of the Indians are believed to be superior to the rights of the whites “no attempt is made to give an opinion upon the question of what water is, as a matter of law, available for the project.” It is also stated (p. 99) that “no account has been taken of the water rights * * * reserved to the United States by the * * * creation of the [Gila River] reservation, in so far as such rights exceed the water rights already used.” In view of these statements in the report which Congress adopted, it cannot be said that the claims of the upper valley users were recognized or that the rights of the Indians were abandoned. These matters were left for future determination and were concluded by the original proceeding in the present case.⁸

3. *Appellants err in contending that under the water commissioner's method of apportionment they will de-*

⁷ A copy of this report has been filed with the Clerk.

⁸ The 1915 report recites (p. 7) that a Board of Army Engineers had previously recommended “that suit for an adjudication of water rights along the Gila River be immediately brought in the United States district court.”

rive no benefit from the San Carlos Reservoir.—Appellants argue (Br. 8, 27–28) that unless all water flowing into the reservoir is to be considered, the amount of the apportionments they receive will be subject to the Government's control. This contention is predicated upon the assumption that the United States can allow the entire natural flow of the stream to pass through the reservoir and thus prevent any water from becoming stored. The argument ignores paragraph 4 of Article VIII which provides (Decree 107; Appendix 26):

That water released at the will of the plaintiff and for the purposes of the plaintiff from the San Carlos Reservoir at any time after the date of this decree other than for the proper irrigation of 80,000 acres of land or its equivalent in the San Carlos Project, shall be considered as stored in the San Carlos Reservoir at and after the date of such releases, and available as a basis for the above described apportionment of the natural flow to said defendants as it would be if such withdrawals had never been made.

Appellants' argument also ignores the fact that the Government's right to divert natural flow water, like the right of any other appropriator, is limited to the amount needed for beneficial use (Decree 112; Appendix 39). Under the decree the Government cannot, and of course would not, allow water to flow through the reservoir and run to waste.

Clearly, under the method of apportionment employed by the water commissioner, the San Carlos Reservoir *inures in part* to the benefit of the upper valley users. For every acre-foot of water stored by the

United States to supplement its natural flow rights, an equal amount of water is apportioned to the appellants. Such apportionments are *in addition to* their rights to draw upon the natural flow under their priorities and are *in disregard* of the prior rights of the Government.

CONCLUSION

It is submitted that the decision of the district court should be affirmed.

Respectfully,

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SEPTEMBER 1940.

No. 9527

4

In the
United States
Circuit Court of Appeals
For the Ninth Circuit

GILA VALLEY IRRIGATION DISTRICT,
FRANKLIN IRRIGATION DISTRICT,
ROY A. LAYTON, MILTON LINES,
WILLIAM WALDRON, ROY D. WIL-
LIAMS, and J. D. WILKINS,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Reply Brief

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No. 9527

Reply Brief

STATEMENT

Appellees statement, as it relates to the issues on this appeal, is approximately correct. However, the impression gained from reading it, to one not familiar with the facts, would be that the decree was such as might be rendered in the ordinary case based upon a trial and adjudication of the relative rights of the parties to use the water of the river. Such an impression

would be misleading as to this case. The entire decree is the result of a compromise, and, to be properly understood, account must be taken of the circumstances surrounding the parties at the time the decree was framed by them and what they were trying to accomplish. There was never anything in the nature of a trial, nor was this decree framed by the court. It is simply a contract entered into between the parties in the form of a decree, which, at the request of the parties, the court accepted and signed. This is apparent from the stipulation entered into by counsel for the respective parties ,appearing on the page immediately following page 113 of the decree (Abs. Rec. Vol. II). In that stipulation the parties say that they "inform the court that they have reached a settlement of the issues in this cause and have adjusted and settled their respective claims as between each other; that they have set up in the within and foregoing decree the respective rights of all parties hereto, and request the court to adopt said decree as its finding * * *."

As illustrative of our criticism of plaintiff's statement and the impression created by it, we call the court's attention particularly to the following statement appearing on pages 4 and 5 of appellee's brief:

"The decree adjudicated to the United States extensive rights to divert the natural flow of the river at points which with one exception are below the reservoir (Arts. V, VI: Decree 12-105; Appendix 2-18). One such right, decreed to the United

States on behalf of the Pima Indians of the Gila River Reservation for the irrigation of 35,000 acres, is of immemorial priority (Art. VI (1) : Decree 86; Appendix 8). It is, therefore, prior to all other rights on the river."

As a matter of fact, there was no *adjudication* in the ordinary sense of extensive rights to the United States. There was an agreement that the United States might exercise certain rights which was based upon the corresponding agreement as to certain rights of these defendants. Furthermore, the statement that such rights are therefore prior to all other rights on the river is misleading, for the reason that any prior rights conceded to the plaintiff were subject to corresponding rights on the part of these defendants, including the right to disregard plaintiff's rights in certain circumstances.

It is also said (bottom page 5 of plaintiff's brief) that "the rights of all parties to the decree are adjudicated and set out in Article V." This again is misleading. Article V is the priority schedule. The rights of the parties cannot be determined from this article alone. It merely establishes priorities which can be used only subject to the rights of the various parties subsequently set out in the decree.

ARGUMENT

Plaintiff's argument is opened with the following statement (Appellee's Br., p. 12):

'In making additional apportionments, the Commissioner must take into consideration only such water as flows into the reservoir and is added to the available stored water.'

This statement begs the real question of the case. What is available stored water? In an effort to bolster the contention that available stored water is only such water as runs into the reservoir and is permitted to remain there and raise the level of the lake, counsel for appellee assert that the controlling provision of the decree is a part of Paragraph 2, Article VIII, which they quote on pages 13 and 14 of their brief. This quoted provision is not in any sense a controlling portion of the decree. The controlling part of the decree with respect to this controversy, is the first paragraph of Article VIII, in which it is agreed that the Upper Valley Users shall be permitted to irrigate their lands to the extent which said lands have theretofore been irrigated. What follows that provision in Paragraph 2 is merely the means of carrying the controlling provision into effect, and must be construed so as to give effect to the agreement of the parties, which is that the Upper Valley Users may use the waters of the stream in disregard of the plaintiff's rights.

It is further stated, on page 14 of Appellee's Brief, that the provision in Paragraph 2 of Article VIII that

“water shall flow into said reservoir and shall be stored there and become added to the available stored water in said reservoir,” clearly shows that water must be left in the lake and raise the level of it in order to entitle the Upper Valley Users to an apportionment, and that to constitute an “accession or newly available stored water supply” there must be an increase in the total amount of water left stored in the reservoir. It will be noted that there is no provision in the quoted language, or elsewhere in Paragraph 2, that the water running into the reservoir must be left there so as to raise the level of the lake. It simply provides: (1) that water must flow into the reservoir. Everyone must concede that water flowing down the river and entering the reservoir does flow into it. The next requirement (2) is that the water running in “shall be stored there.” Clearly any water running into the reservoir is stored there. Under the circumstances, the identical water coming in could not be then taken out. If water is taken out at the same time, it is water that has already been stored, and not the water that is running in. The incoming water goes into storage and the mere fact that an equivalent amount is at the same time taken out does not prevent the incoming water from being stored. The last requirement, (3) that the water coming in must “become added to the available stored water in said reservoir,” is also met. Any water running into the reservoir, when its level is above the point of dead storage and not running over the top of the dam, becomes added to the wa-

ter already stored in the reservoir. Had it been intended that only water which raised the level of the lake was to be considered as stored water, it would have been a simple matter to have so stated, and the quoted language, on page 15 Appellee's brief, would have read:

Water shall flow into said reservoir and shall be stored there and become added to the available stored water in said reservoir *so as to raise the level of the water in the reservoir.*

If Appellee's contention in this respect is correct, the Lower Valley Users, including the plaintiff, would be entitled to take all of the water running into the reservoir as quickly as it came in, and prevent a rise of the lake level and a consequent apportionment to the Upper Valley Users, so long as what they took was not in excess of the amount necessary to properly irrigate 80,000 acres. At least half of this 80,000 acres is junior in right to the lands of the Upper Valley Users. Such a construction would mean that the Upper Valley Users had conceded a priority, so far as their rights to apportionments were concerned, to not only the Indian lands, but also to an amount of White lands equal to the entire Upper Valley project. It is not conceivable that this could have been intended. Throughout Article VIII of the decree, in numerous instances it is provided that the Upper Valley Users may divert the water in "disregard" of the rights of plaintiff. Nowhere in the decree is plaintiff or any other party authorized to disregard the rights of the Upper Valley Users.

Appellee further argues (page 14, Appellee's Br.) that "there is no foundation for appellant's contention that all water which flows into the reservoir is to be made the basis of additional apportionments." In support of this statement, authorities are cited to the effect that water which flows into a reservoir constructed in the channel of a stream does not necessarily become stored there, and that the owner of the reservoir must allow sufficient natural flow to pass through his reservoir to satisfy the prior rights of down-stream appropriators. These authorities might be correct as an abstract proposition of law, but we are not concerned with them here. This case is based upon the agreement of the parties and not upon what the law would be had no such agreement been made. Here it was agreed that the Upper Valley Users might use the water in disregard of plaintiff's prior rights, and we are consequently not concerned with what the rights of the parties might have been had the agreement not been made.

The plaintiff concedes (page 16 Appellee's Br.) that it has no right to store water available to it under its natural flow priorities. This being the law, we challenge counsel for plaintiff to point out a single instance wherein, under their construction of the decree, the Upper Valley Users are permitted to use water in disregard of plaintiff's rights. If the priority schedule, set up in Article V of the decree, is the controlling factor, and the Upper Valley Users are entitled to use water only in accordance with the priorities therein set up, they could

never use any water so long as the amount in the stream was not more than sufficient to supply the needs of plaintiff, and whenever plaintiff permitted its water to be stored, so as to raise the level of the reservoir, the Upper Valley Users would have the right to use the water on their priorities without the necessity of any provision in the decree authorizing them to do so. In other words, under appellee's construction, there would never be an instance where the Upper Valley Users were using the water in "disregard of plaintiff's rights" and the provisions of Article VIII of the decree would be wholly unnecessary.

In support of the argument made on pages 16, 17 and 18 of Appellee's brief, to the effect that Article V is the controlling factor in the decree, and that plaintiff has a right to satisfy its priorities out of the natural flow of the stream, rather than out of stored water, a portion of Article VI of the decree is quoted (page 17 of the brief), which relates to the diversion of the water by plaintiff at the Ashurst-Hayden and Sacaton diversion dams. The quoted portion states that the water diverted there shall be for the supplementation of the amounts available at such dams from the natural flow of the stream. In order to explain this language, it is called to the court's attention that a large amount of water comes into the river below the dam from tributaries, namely, the San Pedro River and Arivaipa Creek and other tributaries, which water is diverted by plaintiff at the Ashurst-Hayden and Sacaton diversion

dams. Of course, this water, which has never been in the Coolidge Reservoir, is natural flow water and the reference made to the "natural stream flow" in this portion of the decree clearly has reference to this water coming into the river below the Coolidge Dam and above the diversion dams.

A similar reference is made (page 18 of the brief) to a portion of Article X of the decree, which is quoted. This language has reference to the water diverted by Anderson, Herring and Glasspie. Their rights must, of course, be measured by the natural flow of the stream since they would not have the right to share in stored water belonging to the plaintiff. However, it is significant that a means of determining what is the natural flow at the point of their diversion is set up in the decree in connection with the rights of those defendants, and it is the only place in the decree where an attempt is made to define the natural flow. The reason is apparent. It is because the plaintiff is not satisfying its rights out of the natural flow, in so far as the waters coming from the Coolidge Reservoir are concerned, and hence there is no necessity of a definition with respect to those rights of plaintiff.

The necessity for Article VIII of the decree and the reasons why it must be construed as we contend are apparent when the circumstances surrounding the framing of the decree are considered. This litigation had been pending a long time before the agreement resulting

in the decree was reached. Plaintiff had been contending, on behalf of the Indians, that it had prior rights to the water for an extensive area. These defendants were contending that they had used the water uninterruptedly for more than fifty years, and that the Indians had no rights superior to their own. There was never an adjudication and decision on these respective contentions. Further, at that time the government had an agreement with the White settlers in the Lower Valley, most of whose rights were conceded to be junior to the rights of the Upper Valley Users, whereby they were dividing the waters with the White settlers. It is apparent, therefore, that a decree could never have been rendered without the consent of all the parties, permitting the government to carry that agreement into effect. What the parties did was to follow the direction of the Secretary of the Interior and arrive at an agreement whereby the Upper Valley Users could continue to use the water to the extent they had theretofore used it. Such an agreement was made and is now before the court in the form of this decree. As we have repeatedly pointed out, the agreement cannot be put into effect except under the construction contended for by appellants. Appellee's counsel assert, however, (p. 20 Appellee's Br.) that if our contention is correct, the United States would have gained nothing through its years of effort and large expenditures of money through its years of effort and large expenditures of money devoted to securing the decree. It is obvious that this is a misstatement. As a result of

the decree, the plaintiff obtained, among other, the following benefits, which could not have been obtained in any other manner :

1. The Upper Valley Users conceded priority to some 39,000 acres of Indian and White lands, a large part of which could never have been established upon a trial of the merits.

2. The Upper Valley Users limited themselves to the use of 6 acre feet per year on each acre of their land, although they then had an adjudicated right to use 9 acre feet.

3. The Upper Valley Users limited themselves to a total consumptive use of water for their entire project not to exceed 120,000 acre feet per year.

4. The government was permitted to carry out the Landowners' Agreement entered into with White settlers in the Lower Valley having rights junior to the Upper Valley Users, as set forth in Article VI of the decree.

5 Under the provisions of the decree, as agreed to, the Upper Valley Users can never receive an apportionment of water for their lands until an equivalent amount has run into the reservoir for the use of the plaintiff and the Lower Valley lands, and even then and after an apportionment has been made, the Upper Valley Users can only get it in the event it is available in the stream.

6. The Upper Valley Users limited their project to its size as of 1924.

Counsel for Appellee further state (page 20 Appellee's Br.): "Nor can any cogent reason be given why the decree should describe the priorities of the United States so fully as it does in Articles V and VI, if in fact they were null." We do not now, nor never have contended that the priority schedule was null. However, in considering the purpose of that schedule in this decree, it must be remembered that this is an agreement as to the relative rights and priorities of the various individuals made parties to the decree. It is not simply a controversy between the Indian lands, on the one hand, and the Upper Valley Users, as a group, on the other. A priority schedule was essential in order to set down and identify the individual rights of all the various defendants, as between themselves, as well as identifying the rights of the government on the one hand, and the Upper Valley Users on the other. There was a further reason for having the priority schedule in that all of the users of water on the river were not made parties to this action, and it was essential that steps be taken to identify and preserve the rights of each individual litigant as against others who were not parties to the decree.

Appellee further takes the position that Article VIII, IX and X of the decree are of a different nature than the balance of it, those articles being what they term "consensual arrangements." We concede that these articles are consensual, but they are no different in their nature from any other portion of the decree. The entire decree

was a consensual arrangement. This is obvious from the preamble of the decree and the stipulation following it.

We cannot agree with the statement of counsel for Appellee (p. 21 Appellee's Br.) "that the terms of the compromise are set out in paragraphs 2 to 5" and that the first paragraph of Article VIII is in the nature of a preamble. The first paragraph of the article is the statement of the agreement of the parties with respect to the right of the Upper Valley Users to continue to use the water to the extent they had theretofore used it. What is set forth in the subsequent paragraphs of that article is merely the means and method of carrying the agreement into effect.

We can see no force to Appellee's argument (pp. 23-24 Appellee's Br.) to the effect that the Upper Valley Users derive a benefit from the San Carlos Act, because under its construction the plaintiff is limited in its use of the natural flow of the stream to an amount sufficient to properly irrigate 80,000 acres. If this contention is correct, it means that the decree not only gave the plaintiff prior rights to the approximately 37,000 acres of Indian lands, but also to an additional 40,000 acres of White lands, the majority of which is conceded to be junior to the rights of the Upper Valley Users. Certainly no benefit comes to the Upper Valley Users from this construction.

Neither is there any force to the argument that the government's right to divert the natural flow of the

United States
5
Circuit Court of Appeals

For the Ninth Circuit.

R. W. BROOKS, CARL M. DONALDSON, BYRON ECHOLS,
B. J. GALE, G. LYNN HATCH, RACHEL JENSEN,
MILTON N. JENSEN, R. T. JOHNS, WILLARD E.
JONES, JOHN B. JONES, PARLEY P. JONES, T. V.
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ANNA H. LUNT, NANCY O. PACE, JUNIUS E.
PAYNE, J. E. PAYNE, Trustee of the Church of Jesus
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RICHARDSON, R. RICHENS, NANCY A. SMITH, E.
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Appellees.

Transcript of Record
In Five Volumes

VOLUME I

Vols 2, 3, 4, 5 missing

Upon Appeal from the District Court of the United
States for the District of Arizona.

United States
Circuit Court of Appeals

For the Ninth Circuit.

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**Upon Appeal from the District Court of the United
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In the United States District Court
for the District of Arizona

E-59

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GILA VALLEY IRRIGATION DISTRICT, et al.,
Defendants.

DOCKET ENTRIES

Date				Filings—Proceedings.
	Month	Day	Year	
1	Oct	3	1925	File Complaint
*	*	*	*	* * * * *
66	Dec	5	1927	File Amended Complaint.
*	*	*	*	* * * * *
103	Oct	8	1928	File Admission of Service of Amended Complaint, & Stip. extending time to Answer to & including 11/5/28 of Deft Franklin Irrigation District & 301 other Defts
*	*	*	*	* * * * *
113	Jan	8	1929	File Answer of Greenlee County, Ariz, and Hidalgo Co. New Mex, defts to amended complaint
*	*	*	*	* * * * *
417	Apr	10	1940	File Supersedeas Bond on Appeal pursuant to Order of 4/10/40 (contempt) (National Surety Corporation of New York)
*	*	*	*	* * * * *

[Title of District Court and Cause.]

AMENDED COMPLAINT

1. The United States of America, having first obtained leave of the Court, brings this, its Amended Bill of Complaint against the following named defendants:

Gila Valley Irrigation District, et al:

Virden Irrigation District

Cosper-Windham Canal Company:

J. R. Beavers, H. G. Davidson (being the same person named in the original complaint as E. G. Davidson), Estate of Jasper Gale, A. T. Layton, R. H. Lunt, Arven Mortensen (being the same person named in the original complaint as Arvin Mortensen), Peter Mortensen, W. Plune Tibbets (being the same person named in the original complaint as P. Tibbets), Peter Wahlin (being the same person named in the original complaint as Peter Whelin), Mrs. T. M. Williamson (being the same person named in the original complaint as T. M. Williamson);

Greenhorn Ditch Company; Shriver Ditch Company: W. W. Lloyd, Frank Shriver (being the same person named in the original complaint as John Shrivvers), W. F. Shriver;

Sunset Canal Company:

Florentino Billaba, C. M. Brooks, R. W. Brooks, S. A. Brown, J. E. Cardon, Byron Echols, M. B. Echols, W. P. Foster, Trivio Gonzales, H. Grady, M. L. Harris (being the same person named in the

original complaint as M. F. Harris), C. F. Houlihan (being [508] the same person named in the original complaint as C. F. Houhilan, M. J. Jensen, J. B. Johns, R. T. Johns, Delbert Johnson (being the same person named in the original complaint as D. Johnson), D. L. Johnson, F. W. Jones, John B. Jones, Mary Jane Jones, Parley P. Jones (being the same person named in the original complaint as Perley P. Jones), T. V. Jones, Willard E. Jones (being the same person named in the original complaint as Willard L. Jones), Anna H. Lunt, G. V. Lunt, P. L. Lunt, M. J. McClaren, Orson A. Merrill (being the same person named in the original complaint as Orson Merrill), Fenley F. Merrill, Hans Mortensen, Hiram K. Mortensen, Joseph A. Mortensen, Mrs. J. O. Pace, E. C. Payne, G. O. Payne, Junius E. Payne, Leslie B. Payne (being the same person named in the original complaint as L. Payne), H. M. Payne (being the same person named in the original complaint as H. N. Payne), R. Richardson, Henry L. Smith, B. Y. Whipple (being the same person named in the original complaint as D. Y. Whipple).

(The complaint in paragraph I, in addition to the foregoing, named as defendants some 40 canal or ditch companies and irrigation districts and approximately 1500 defendants, comprising municipal corporations, school districts, corporations and persons, residents of Arizona and New Mexico, who are not Indians or wards of the United States or represented by the United States.)

Answer under oath is hereby expressly waived.

For its cause of action the plaintiff alleges:

2. That the jurisdiction of this court in this suit depends upon the fact that the United States of America is a party thereto.

3. That this suit is brought by the United States for itself and as Trustee and Guardian for the Pima and Apache Indians, occupants and possessors of large areas of land with water rights appertaining thereto in the Gila River Indian Reservation and the San Carlos Indian Reservation, respectively, [509] in the State of Arizona; and is instituted at the suggestion of the Secretary of the Interior and by direction and authority of the Attorney General.

4. (a) That the defendant, Gila Valley Irrigation District, is an irrigation district organized and existing under the laws of the State of Arizona, havings its principal place of business in Graham County in the District of Arizona; that the defendant, Florence-Casa Grande Water Users' Association, is an association authorized under the laws of the State of Arizona to do business in the District of Arizona, havings its principal place of business in the District of Arizona; that the defendant, Franklin Irrigation District, is an irrigation district organized and existing under the laws of the State of Arizona, having its principal place of business in Greenlee County in the District of Arizona; that the defendant, Virden Irrigation District, is an irrigation district now in process of

organization under and pursuant to Chapter 41, and Session Laws of the State of New Mexico, 1919, and is being organized and incorporated as a body corporate and politic of said State of New Mexico.

* * * * *

(c) That certain others of said defendants, to-wit: * * * Sunset Canal Company, Sunset Irrigation Canal Company * * * are corporations doing business in Greenlee County in said District of Arizona.

* * * * *

(f) That certain others of said defendants, to-wit: Cosper-Windham Canal Company, Franklin Canal Company, Greenhorn Ditch Company, Nichols and Company, Sunset Canal Company, and Valley Canal Company are corporations doing business in the District of New Mexico, County of Hidalgo. * * *

5. That the Pima Indians, from time immemorial until the first reservation was made for them by the United States, as hereinafter described, occupied and possessed a large area of land on [510] the Gila River in the State and District of Arizona, which area included the lands now embraced in the Gila River Indian Reservation. When the first White Men visited that region, they found these Indians irrigating from the Gila River extensive areas of said land, and raising large crops thereon. These Indians then numbered about as many persons as they do to-day, which is approximately 5,000. They claimed a larger area along the Gila

River than that now embraced in their reservation, but later agreed with the United States to accept their present boundaires. The land they occupied, including those comprising their present reservation, are arid and to produce crops require irrigation. The Indians at all times have held and now hold, under the Indian title of occupancy and possession, the lands now comprising the said reservation.

6. The Gila River is an innavigable stream which flows through the said reservation from east to west. With the lands of said reservation, the Pima Indians also did and do occupy and possess to a large extent the usufruct of the waters of the Gila River, and with said waters at all times have irrigated large areas of said lands. The waters thus possessed by said Indians are a quantity sufficient to irrigate the lands subsequently allotted to them as irrigable allotments, said allotments being made to individuals among said Indians and amount to 49,896 acres; and also enough water to irrigate such parts of said reservation as have come to be used for a school farm, agricultural experiment station, and for other administrative purposes. The areas of this latter character comprise approximately 650 acres. The waters so occupied amount to 632 second-feet running continuously throughout the year, but with a limitation for each year of 252,730 acre-feet of water. Such waters, to the extent that they have been used thus far for irrigation, have been diverted through numerous canals having their headings within said reservation, and

they are now to be diverted through the same canals, and also by [511] means of the Ashurst-Hayden dam, situate about ten miles above the town of Florence, Arizona, and the Sacaton dam, situate on said reservation. The priority of the rights of said Indians and of the United States to said waters is of immemorial date.

7. The United States, on its acquisition from Mexico (by the Treaty of Guadalupe-Hidalgo and the Gadsden Purchase) of the territory within which are the lands occupied by the Pima Indians (and also those occupied by the Apache Indians, rights concerning which are hereinafter described), became and ever since has remained the guardian of the Indian inhabitants, including the said Pimas and Apaches, and became the owner of the soil of said territory (with the exception of that contained in certain Spanish and Mexican grants theretofore made, but not relevant here). The title of the United States to the lands thus acquired from Mexico also as just stated was encumbered by the aforesaid title of occupancy and possession of the Pima Indians and by a like title of the Apache Indians. The United States, upon such acquisition, furthermore became the full sovereign of said territory, having both national and municipal or state sovereignty; and it had plenary power over said lands and waters.

(a) Thereafter, the United States, by a series of Acts of Congress, proclamations and executive orders, including the following: Act of February

28, 1859 (11 Stat. 501); Executive Orders of date August 31, 1876, January 10, 1879, June 14, 1879; May 5, 1882; November 15, 1883; May 2, 1911; July 31, 1911; December 16, 1911; June 2, 1913; August 27, 1914; March 18, 1915; and July 19, 1915, recognized that the lands and waters above described belonged to the Pima Indians under their title of occupancy and possession, and confirmed and made more secure those rights as far as they covered or related to said reservation, and reserved for said Indians the lands and water rights comprised in or connected with the Gila River Indian [512] Reservation. The lands in said reservation are situate in the Counties of Pinal and Maricopa, and comprise about 375,422 acres. The reservations thus made have been approved, ratified, confirmed, and recognized, and the purposes connected with them have been carried out by numerous Acts of Congress and proclamations and executive orders. Furthermore, the United States, ever since said Gila River Indian Reservation was established, has maintained thereon extensive schools, administrative offices and other facilities for carrying out the Federal Indian policy and for educating the Indians of said reservation and helping them to acquire the habits of civilized life.

(b) The water rights reserved in connection with the reservation of said land for the Pima Indians are alleged to be the following to-wit: So much of the waters of the Gila River as should be needed to carry out the purposes of the United

States in recognizing and in making said reservation of lands, and also in accomplishing the civilization and bringing about the prosperity of said Indians. The said rights amount to the same quantities of water as stated in the foregoing article 6, to-wit: 632 second-feet of the waters of said Gila River running continuously throughout the year but with a limitation for each year of 252,730 acre-feet of water. Said rights have an immemorial priority as set forth in Paragraph 6 as well as of the date of said first reservation, which was February 28, 1859.

8. The Pima Indians, from the time of the first knowledge of white men concerning them, and previous thereto, and before any appropriations or uses of waters of the Gila River by White Men, and until and including the present time, have irrigated with the waters of that river large areas of the lands now included in their said reservation and allotments, and cultivated crops upon them, through various canals and ditches, many of [513] which ditches are, and even in ancient times were, of large size. The lands so irrigated, as shown by surveys made in recent years of present and past cultivated areas, amount to not leses than 28,000 acres.

(a) The United States, therefore, is entitled to and claims on account of said Indians, as mere appropriators with an immemorial priority, the use of 350 second-feet of water, continuous flow, from

said river, with a yearly limitation of one hundred forty thousand (140,000) acre-feet.

9. The Apache Indians, at a long time antedating the acquisition by the United States of the lands ceded as aforesaid by Mexico, occupied and possessed and owned, under the Indian title of occupancy and possession, subject only to whatever rights of a like nature their neighbors and enemies, the Pima Indians, had, a large area which included that now reserved to them by the establishment of their reservation known as the San Carlos Indian Reservation. This reservation is comprised of one million, eight hundred thirty-four thousand, two hundred forty (1,834,240) acres, and is situate in Gila and Graham Counties, in the state and District of Arizona.

(a) The said Apache Indians were hunting and war-making Indians, and were confined in the above-described area, which was smaller than that over which they formerly roamed and which they formerly claimed; said confinement was the result of wars and agreements, and the said reservation was made pursuant to the policy of the United States with regard to said Apache and other Indians, of inducing them or compelling them to confine themselves to definite areas and of teaching them through agriculture and otherwise, to adopt the ways of civilized life. The aforesaid reservation for said Apache Indians was made as an addition to the White Mountain Reservation theretofore

established, and the proclamations and executive orders creating it include the following dates:

December 14, 1872; August 5, 1873; July 21, 1872; October 30, 1876; January 26, 1877; March 31, 1877; December 22, 1902; February 17, 1912. [514]

(b) The Apache Indians above-mentioned, with other Indians admitted to share their rights with them, number some twenty-six hundred (2600) persons, some five hundred (500) of whom live upon the Gila River proper, while the rest live upon the San Carlos River. These Indians are entitled by their rights of occupancy and possession and on account of the reservations thus made, to sufficient water for the irrigation of the lands deemed necessary for them to irrigate from the Gila River, excluding the San Carlos River, three thousand (3000) acres of land, which lands are of a good agricultural character and are susceptible of irrigation from said stream and require irrigation to make them capable of producing crops. The amount of water to which the United States and the said Indians are entitled, on said account, is $37\frac{1}{2}$ second-feet of continuous flow, with a limitation of fifteen thousand (15,000) acre-feet per year. The said water rights has a priority, antedating all priorities of white persons and as of the date when the Apache Indians first came to occupy said territory, which was before the United States or Mexico acquired sovereignty thereof, as well as a priority as of the

date of said first reservation, which was December 14, 1872. Said reservation was made at a time when the United States had both national and municipal sovereignty and plenary power with regard to the disposition of said lands and waters.

10. The Indians of said San Carlos Reservation irrigated with the waters of the Gila River, exclusive of the waters of the San Carlos River, through a number of ditches on their reservation aforesaid, from the year 1873 to the year 1900, and since, beginning with 100 acres and increasing to 2,500 acres of land in the year 1900, and on account thereof the United States is entitled, as a mere appropriator, to 32 second-feet of water, continuous flow, with a limitation of 12,800 acre-feet of water per annum, with priorities as of the dates of original and increased irrigation, and all prior to the year 1901. [515]

11. From the time of the first establishment of the Gila River Indian Reservation as aforesaid, until the passage of the Act of Congress of May 18, 1916, described in the next Article hereof, the United States, in carrying out its policy with regard to the Indians of said reservation, did many things on and connected with said reservation to aid said Indians in irrigating their lands, and was supported therein by the individual and group efforts of the Indians themselves. Among said things have been the improvements of old Indian canals and the construction of new ones, including the building of the new San Tan Canal on the north side of the said

river, through the Reclamation Service, in 1906, at an approximate cost of Five Hundred Thousand (\$500,000.00) Dollars; the construction of the Sacaton Dam, which is just now being completed at a cost of approximately Seven Hundred Thousand (\$700,000.00) Dollars; the improvement of the Little Gila Canal with laterals therefrom, a work accomplished under a number of subordinate projects, among which are the Little Gila and Island Projects, under which was expended approximately Seventeen Thousand (\$17,000.00) Dollars, and the Casa Blanca Canal Project, under which was expended about Twenty-five Thousand (\$25,000) Dollars. The United States duly posed and recorded Notices of Appropriation in respect to each of said enterprises in conformity with State law. The work under said Projects has been and is being diligently prosecuted; the acts done under them have been for the purpose of irrigating all of the aforesaid allotments of the Indians of said reservation, or allotments which may be substituted therefor, except possibly a comparatively small number of such allotments comprising not more than 1,300 acres which can be irrigated best with water from the Salt River. Said acts were also for the purpose of irrigating the lands on said reservation utilized by the Government for administrative and agricultural experiment station purposes. Said areas aggregate approximately 650 acres. [516]

(a) The aforesaid activities of the United States were undertaken and carried out in furtherance of

the Indian occupancy and reservation rights hereinbefore set forth, and have been prosecuted with diligence. Said activities entitle the plaintiff to water rights and priorities as aforesaid of immemorial date as well as of the date of said first reservation, and as mere appropriations as of the dates of the posting of said Notices and the doing of said acts.

12. Under the Act of Congress of May 18, 1916, heretofore referred to, the United States, through the Secretary of the Interior, promptly settled water rights between all but a few of the White landowners and water users of the Florence-Casa Grande Valley and the United States on account of the Pima Indians, and undertook and established the Florence-Casa Grande Project.

(a) The United States, in furtherance of said Project, supplementary to other rights therefor hereinabove set out, on May 22, 1916, duly gave notice of appropriation and reservation of waters of the Gila River for said Project by posting a notice at the site of the dam named below, and recording the same, and otherwise. The amount of water claimed under said notice was 2,000 second-feet.

(b) That Project contemplates the irrigation of at least 62,000 acres of land, with the idea that approximately 35,000 acres shall be Indian lands embraced in the allotments aforesaid and including the said administrative lands, and 27,000 acres of White lands in the Florence-Casa Grande Valley.

The work in connection with said Project was promptly begun and has been diligently prosecuted from the time of its inception under said Act in 1916 and from the time of said notice, and is now being so prosecuted. The Ashurst Hayden diversion dam, which is one of the structures of said Project, was finished in the year 1922, and cost approximately Two Hundred Fifty Thousand (\$250,000.00) Dollars. From that dam run the canals of the Project which take the water to the Indian and White distributing systems thereof. Sand canals have largely been completed, and to date have cost approximately Seven Hundred Fifty Thousand (\$750,000.00) Dollars, [517] and, together with said dam, are adequate to divert and in fact have a capacity of more than 1,000 second feet.

(c) Certain White persons, owners of the 27,000 acres of lands aforesaid which were taken into the Casa Grande Project, by themselves and their predecessors in interest, by the posting of notices under the Territorial and State laws, by diligent construction of works, diversion and carriage of the waters of the Gila River to their lands and application thereof to beneficial use thereon, had acquired vested rights by appropriation to said waters as of various dates (as stated in the Lockwood Decree and Order of the Secretary of the Interior hereinafter referred to), which, in the aggregate, with certain 1915 priorities given under said Project, amounted to 337.5 second-feet with a limitation of 135,000 acre-feet per annum, and granted and con-

veyed the same to the United States for use in connection with said Project at or about the time of the above-mentioned settlement of rights therefor. Descriptions of the several tracts of land supplied by the aforesaid rights, and descriptions of said rights and their respective extents and the priorities thereof are contained in the Order of the Secretary of the Interior made April 22, 1920, designating the White lands to be included in the Florence-Casa Grande Project, and in the original and supplemental decree of the Superior Court of Pinal County, Arizona, made in the case of Lobb v. Avenente, et al., and commonly called "the Lockwood Decree."

The Acres and Priorities fixed in said Order as follows:

* * * * *

Total 27,000 acres.

Descriptions of the several tracts of land covered by the aforesaid rights are set forth in the Order of the Secretary of the Interior made April 22, 1920, designating the White lands to be included in the Florence-Casa Grande Project. [518]

(d) Also, at that time, there were conveyed to the United States, in connection with and for use upon said Project, many inchoate water rights owned by said White persons and others connected with them and acquired in the manner aforesaid. Said rights include those initiated and claimed by the Casa Grande Valley Water Users' Association, which Association partly constructed a large canal which was later purchased and taken over by the

United States, at a cost of Fifty Thousand (\$50,000.00) Dollars, and is now in process of completion by the United States as one of the main canals of said Project. Said Association spent in the construction of said canal upwards of Eighty Thousand (\$80,000.00) Dollars.

The United States claims, on account of said reservation and as a mere appropriator, for said Project, 775 second-feet of water, continuous flow, with a limitation of 310,000 acre-feet per year, with a priority as of the date of the passage of said act, which was May 18, 1916, as well as of the date of the posting of said notice, which was May 28, 1916; and claims on account of said conveyed vested rights of White persons 337.5 second-feet of water, continuous flow, with a right of storage in the Picacho Reservoir, and with a limitation of 135,000 acre-feet per annum, with priorities as in said order mentioned.

13. The United States, before the year 1896, and before the passage of the Reclamation Act (Act of June 17, 1902, 32 Stat. 388), made examinations of the water resources of a considerable part of the United States, through the Geological Survey, in anticipation of the adoption by the United States of the so-called Reclamation Policy. Among the water resources examined were those of the Gila River, and the fact, which even at that time had long been known, was by such examinations confirmed, that the so-called San Carlos Reservoir

Site was the most important site for a reservoir on the Gila River, and one of [519] the most important sites for an irrigation reservoir anywhere in the southwestern part of the United States.

(a) The United States, by such investigations and the appropriations of Congress authorizing and supporting them, initiated at that time, which was prior to 1900, the so-called San Carlos Project. The site for the dam and the site for the reservoir of said Project are situated on the aforementioned San Carlos Indian Reservation, which Reservation, as before stated, was set aside for the Apache Indians on December 14, 1872. From the earliest days of the consideration of the San Carlos Project, the United States set apart, protected and reserved the said dam and reservoir sites for the purposes of said Project, and thenceforward, by numerous Acts of Congress and acts of the executive branch, refused to permit encroachments upon said sites, and preserved the same for the purposes of said Project.

(b) The United States, in further carrying out the San Carlos Project, so constructed and organized its Florence-Casa Grande Project, hereinbefore described (all of the lands of which are expected to be included in the San Carlos Project), as to make it suitable for utilization in connection with the San Carlos Project. The United States, in still further carrying out and protecting said San Carlos Project, and in order to preserve from encroachments the waters necessary therefor, and to make the waters of the Gila River, not theretofore

appropriated by and vested in others, available for irrigation of the lands of said Project, whether said lands should be below or above the said proposed Coolidge Reservoir, reserved, among other things, dam and reservoir sites upon the Gila River, by executive orders as follows: January 18, 1906; December 18, 1909; March 1, 1912; March 18, 1915; February 1, 1917; March 21, 1917; March 15, 1920; May 25, 1920; October 23, 1924; and November 22, 1924.

[520]

(e) By the Act of June 7, 1924, entitled "An Act for the continuance of Construction Work on the San Carlos Federal Irrigation Project in Arizona" (which is the San Carlos Project heretofore referred to (43 Stat. 475, 476) "and for Other Purposes", the Secretary of the Interior is authorized to construct, under a limit of cost of Five Million, Five Hundred Thousand (\$5,500,000.00) Dollars, a dam at the said San Carlos reservoir site, and to create said reservoir; and pursuant to said Act, work is being diligently prosecuted to complete said project.

(d) It is contemplated that said Project will irrigate: (1) the irrigable allotments (each of which embraces ten irrigable acres) made to the Indians of the Gila River Indian Reservation and now held by them under trust patents, or any other allotments which may in individual cases be substituted therefor, together with the administrative areas above alleged; (2) the 27,000 acres of White lands now embraced in the Florence-Casa Grande Project; (3) such a quantity of White lands as,

with the foregoing Indian and White lands, will make up one hundred thousand acres, and (4) such additional lands as it shall be found feasible to irrigate as a part of said Project.

(e) The said Reservoir, by the Act of Congress of June 7, 1924, (43 Stat. at Large, 475, 476), as planned for and being built, has been named the "Coolidge Reservoir" and will have a capacity of 1,285,000 acre-feet of water; and, in order to give proper service and make economical use of the water resources of the said Gila River and of the resources of said reservoir, it will have to be filled and kept filled by the waters of said river as often as the yield of said river permits, and said waters as thus stored are and will be necessary for the proper irrigation of the lands included within said Project as above described.

(f) The United States, by undertaking said San Carlos Project, as aforesaid, and by steps made in connection therewith, has reserved and appropriated of the waters of the Gila River sufficient water to fill and keep full said reservoir, [521] as aforesaid, with a priority as of not later than the year 1896. The United States has also, by said acts, reserved and appropriated whatever water, if any, may be necessary from the Gila River, to be diverted at the Ashurst-Hayden dam and the Sacaton Dam for the irrigation of lands lying below said points of diversion which will be included in said Project.

14. By reason of the things hereinabove set forth, the United States has reserved and appro-

priated, acquired and owns, and is entitled to use for said Indian reservations, the Florence-Casa Grande Project and the San Carlos Project, in the waters of the Gila River, the rights hereabove enumerated, the same being briefly stated as follows:

(a) 632 second-feet of water, with a limitation of 252,730 acre-feet per annum, with a priority of immemorial date, as well as of February 28, 1859, and 350 second-feet with a yearly limitation of 140,000 acre-feet with a priority of immemorial date, to be diverted on the Gila River, but not below the west line of the Gila River Indian Reservation, now reserved as claimed under Articles 5, 6, 7, 8, and 9 hereof, the first figures above-named representing the total diversion under these priorities.

(b) 37½ second-feet of water with a limitation of 15,000 acre-feet per annum, and 32 second-feet with a yearly limitation of 12,000 acre-feet, to be diverted by ditches serving the San Carlos Reservation lands or any lands which may be substituted therefor, or to be stored as claimed in Articles 9 and 10 hereof, with priorities, respectively, as of the year 1846, when the United States obtained sovereignty over that territory, as well as of December 14, 1872, when said San Carlos Reservation was made, and as of the [522] dates from 1873 to 1901, stated in Article 10; the

figures first above named representing the total diversion under these priorities.

(c) 775 second-feet of water, with a limitation of 310,000 acre-feet per annum, and 337.5 second-feet, with a yearly limitation of 135,000 acre-feet, to be diverted at the Ashurst-Hayden dam and the Sacaton Dam, and at intermediate places on said river, as claimed in Article 11 hereof, with priorities, respectively of May 18, 1916, as well as of May 22, 1916, and as in the Lockwood Decree and Order of the Secretary of the Interior fixed, as mentioned in Article 12 hereof; the first above-named figures representing the total diversion under the priorities.

(d) Sufficient water to fill and keep filled each year the Coolidge Reservoir aforesaid, which has a capacity of 1,285,000 acre-feet, with a priority not later than the year 1896, and water directly diverted from the natural flow of said Gila River, as claimed in Article 13 hereof.

15. Each of the defendants, except those who have by contracts devoted their water rights to the said Florence-Casa Grande Project, and the San Carlos Project, and so are interested on the side of the United States in this action, as above set forth, claims some right to divert water from the Gila River as it flows between a line 10 miles east of the parallel to the dividing line between Arizona and New Mexico, and the confluence of the Salt

River with the Gila River, and after the following tributaries of the Gila River, the San Francisco River, the San Carlos River, the San Pedro River, and the Santa Crus River, respectively, have joined the main stream, and all but a few of said diversions being in the [523] District of Arizona; or the said defendants claim some right to store the water of said river, or of some tributary thereof, either within or above the stretch of the same as just described. The United States has no knowledge or means of knowledge of the exact nature of the claims of the defendants to rights in or or the use of said water, but such claimed rights, so far as the United States has knowledge thereof, are numerous, intricate and various, and are conflicting with and adverse to the rights of the United States as hereinabove set forth; and the rights claimed by the defendants, if exercised, would, and when exercised do, diminish the volume of water in said river so as to deprive the United States of the amount of water to which it is entitled.

(a) Until the rights of the various claimants, parties hereto, including the United States, to divert and use the waters flowing in said river within the area above defined, or to store such water above, with the extent, nature and priority of such rights, have been judicially determined, the United States cannot properly protect its rights to said waters; and to protect them otherwise than is herein sought, if they could be so protected, would necessitate a multitude of suits.

Wherefore the United States prays:

First: That the writ of subpoena issue to each and all of said defendants, and that they be required to answer this complaint and set up fully their claims to the waters of said river within the areas above defined.

Second: That the Court, by its decree, determine the rights of the parties hereto to the waters of said river and its tributaries and the rights of said parties to divert water from said river within the area aforesaid and for storage above, to the end that it may be known how much of said waters [524] may be diverted from said river by the parties hereto and for what purposes, where, by what means of diversion and with what priorities.

Third: That the Court decree to the United States the water rights hereinabove set forth as owned and claimed by the United States, and quiet its title therein, and enjoin said defendants and each of them from interfering therewith, and provide also such means for the carrying out of its decree herein as may be proper.

Fourth: That the United States recover its costs herein and have such other, further and different relief as to the Court may seem just.

And Plaintiff will ever pray.

JOHN G. SARGENT,

The Attorney General of
the United States.

By EDWARD A. SMITH,

Special Assistant to the
Attorney General.

[Title of District Court and Cause.]

ADMISSION OF SERVICE OF AMENDED
COMPLAINT, AND STIPULATION EX-
TENDING TIME TO ANSWER TO AND
INCLUDING THE 5TH DAY OF NOVEM-
BER, 1928.

And come also, by their Attorneys, Francis C. Wilson, A. R. Lynch, and H. A. Elliott,

Virden Irrigation District, situate, lying and being in Hidalgo County, New Mexico, and a de facto Irrigation District under Chapter 41 of the Session Laws of New Mexico, 1919, and Acts amendatory or supplemental thereto;

Sunset Irrigating Canal Company, situate, lying and being in Hidalgo County, New Mexico;

Valley Canal Company, Moddle Canal Company, and Cosper & Windham Canal Company, situate, lying and being in part in Hidalgo County, New Mexico;

Hans Anderson, D. E. Barlow, R. W. Brooks, Bank of Duncan, J. R. Beavers, Florentino Bilalbalba, C. M. Brooks, S. A. Brown, J. L. Crabtree, George Cosper Estate, J. E. Cardon, E. G. Dairdson, Byron Echols, M. V. Echols, W. F. Foster, Jasper R. Gale Estate, B. J. Gale, H. Grady, Gila Ranch, Trivio Gonzales, G. Lynn Hatch, M. L. Harris, C. F. Houlihan, Mary J. Jones, D. L. Johnson, John B. Jones, G. W. Johnson, F. W. Jones, M. J. Jones, T. B. Jones, Delbert Johnson, M. J. Jensen, Parley P. Jones, W. E. Jones, R. T. Johns,

Owen Lunt, Anna H. Lunt, A. T. Layton, G. V. Lunt, [526] R. H. Lunt, W. W. Lloyd, P. L. Lunt, M. J. McLaren, E. A. Merrill, Hans Mortensen, T. S. Merrill, F. F. Merrill, O. A. Merrill, Arven Mortensen, Peter Mortensen, J. A. Mortensen, J. A. Mitchell, Hiram K. Mortensen, T. J. Nations, State of New Mexico, W. C. Packer, E. C. Payne, G. O. Payne, C. Pirtel, H. M. Payne, Leslie B. Payne, J. E. Payne, Mrs. J. O. Pace, H. Richardson, M. E. Stewart, Florence R. Swafford, W. F. Shriver, Henry L. Smith, W. P. Tippetts, Peter Wahline, B. Y. Whipple, Mrs. T. M. Williamson, and/or the successor in interest of each of them;

Each of whom is of the defendants named in the above entitled cause and/or a claimant of rights, to water of the Gila River and its tributaries, appurtenant to land situate in Hidalgo County, New Mexico, and included within said Virden Irrigation District, a de facto Irrigation District, as aforesaid, and embraced within the subject matter of this suit, and is a party in interest therein whether named in plaintiff's Amended Complaint or not.

And come also, by their Attorneys Francis C. Wilson, A. R. Lynch, and H. A. Elliott, Greenhorn Ditch Company, Shriver Ditch Company, and Sunset Canal Company, named in plaintiff's Amended Complaint. [527]

And acknowledge, as of the 5th day of October, 1928, service upon each of them of the Amended

Complaint filed in the above entitled cause on the 5 day of Dec, 1927.

FRANCIS C. WILSON

Solicitor for the claimants of rights to water of the Gila River and its tributaries appurtenant to land situate in Hidalgo County, New Mexico, above named, and for whom service of plaintiff's Amended Complaint is herein accepted.

A. R. LYNCH

H. A. ELLIOTT

Solicitors for the claimants of rights to water of the Gila River and its tributaries appurtenant to land situate in Greenlee County, Arizona, and in Hidalgo County, New Mexico, above named and for whom service of plaintiff's Amended Complaint is herein accepted.

[Endorsed]: Filed Oct. 8, 1928. [528]

[Title of District Court and Cause.]

ANSWER TO AMENDED BILL OF
COMPLAINT

Come now, * * *

Group V.

(Virden Irrigation District)

1. Virden Irrigation District, an irrigation district in the course of incorporation under the laws of the State of New Mexico;

2. Cosper Windham Ditch, an un-incorporated canal company:

J. R. Beavers, R. W. Brooks, George H. Cosper, Jr., Administrator of the Estate of George Cosper, Deceased, E. G. Davidson, R. H. Friestone, O. C. Greenwell, G. Lynn Hatch, M. N. Jensen, R. H. Lunt, Randall Lunt, Administrator of the Estate of Jasper Gale, Deceased, Peter Mortensen, Arven Mortensen, Florence R. Swofford, W. P. Tibbets, Mrs. T. M. Williamson; * * *

5. Sunset Ditch Company, a corporation:

M. M. Allred, Hans Anderson, Florentino Bil-laba, C. M. Brooks, R. W. Brooks, S. A. Brown, J. E. Cardon, Carl Donaldson, M. B. Echols, Byron Echols, W. F. Foster, Gila Ranch Company, a corporation, Trivio Gonzales, H. Grady, M. L. Harris, C. F. Houlihan, R. T. Johns, Delbert Johnson, D. L. Johnson, F. W. Jones, J. B. Jones, Mary J. Jones, W. E. Jones, Parley Jones, T. V. Jones, M. J. Jones, G. V. Lunt, P. L. Lunt, Anna Lunt, W. J.

Mabin, F. F. Merrill, O. A. Merrill, J. A. Mitchell, [529] Hans Mortensen, Hiram K. Mortensen, J. A. Mortensen, M. J. McClaren, E. C. Payne, G. I. Payne, H. M. Payne, J. E. Payne, Nancy O. Pace, Leslie B. Payne, Ralph Richardson, Orson Richens, Henry L. Smith, School District No. 2, County of Hidalgo, State of New Mexico, known also as, Virden School, State of New Mexico, Peter Wahline, Virden Ward, B. Y. Whipple; * * *

And answering plaintiff's Amended Bill of Complaint, deny, admit, and aver, as follows:

I.

Answering paragraph 1 of said Amended Bill of Complaint, these defendants,

Admit that plaintiff brings said Amended Bill of Complaint against the defendants named in said paragraph 1 of said Amended Bill of Complaint.

II.

Answering paragraph 2 of said Amended Bill of Complaint these defendants,

Admit that the jurisdiction of this Court in this suit depends upon the fact that the United States of America is a party thereto.

III.

Answering paragraph 3 of said Amended Bill of Complaint, these defendants,

Admit that this suit was brought by plaintiff for itself and as Trustee and Guardian for the Pima and Apache Indians, and that said suit was

instituted at the suggestion of the Secretary of the Interior by direction and authority of the Attorney General of plaintiff. * * *

IV.

Answering paragraph 4 of said Amended Bill of Complaint, these defendants, [530]

Admit that Franklin Irrigation District mentioned in sub-paragraph (a) of said paragraph 4 of said Amended Bill of Complaint, is an Irrigation District organized and existing under the laws of the State of Arizona, and has its principal place of business in Greenlee County in the District of Arizona, and that Virden Irrigation District, mentioned in said sub-paragraph (a), is an Irrigation District now in process of organization under and pursuant to Chapter 41, Session Laws of the State of New Mexico, 1919, and upon completion of such organization will become and continue to be a body corporate and politic of said State of New Mexico.

Admit that the persons, canal companies, corporations and associations, mentioned in sub-paragraphs (b) to (k), both inclusive, of said paragraph 4 of said Amended Bill of Complaint, or their successors in interest and for whom answer is herein made, are doing business either in the County of Greenlee, District of Arizona, or in the County of Hidalgo, State of New Mexico, or are residents of either said County of Greenlee or County of Hidalgo. * * *

XV.

Answering paragraph 15 of said Amended Bill of Complaint, these defendants,

Admit that these defendants claim the right to divert water from the Gila River and the right to store the water of the Gila River, and each of such claims is adverse to the rights claimed by plaintiff in and to the waters of said Gila River, as set forth in said Amended Bill of Complaint.

Deny that said rights claimed by these defendants, if exercised, singly or conjointly, would, and/or when exercised, singly or conjointly, do diminish the water of said Gila River so as to deprive plaintiff of water to which it is lawfully entitled. * * * [531]

5. As to defendant Sunset Ditch Company, a corporation, and the defendants named in paragraph (m) of this part 5,

(a) That in the year 1874 divers settlers, individuals, and citizens of the United States entered in and upon certain lands, being a part of the public domain of the United States in Sections 31, 32, and 33 of Township 18 South, Range 21 West, and in Sections 7, 17, and 18 of Township 19 South, Range 20 West, and in Sections 2, 11, 12, and 13 of Township 19 South, Range 21 West, New Mexico Principal Meridian, in the County of Hidalgo (then Grant), State (then Territory) of New Mexico. That thereafter and from year to year, other settlers, individuals, and citizens of the United States

entered upon certain other lands of said public domain in Section 34 of said Township 18 South, Range 21 West, and in Section 3 of said Township 19 South, Range 21 West, in said County and State. That said entrymen settled upon said lands and instituted the necessary proceedings for the acquisition by them of said lands under the laws of the United States then in force and effect, either by homestead entries, desert land entries, or otherwise; that said entrymen and their successors in interest have complied fully with the laws of the United States relative to the acquisition of such lands, and have acquired and now hold absolute title in fee simple to such lands, whether by patent or mesne conveyance from the original entrymen thereon, as hereinafter particularized in paragraph (m) of this part 5.

(b) That the greater portion of said lands did and do comprise alluvial flats of great agricultural value susceptible of irrigation with the water of the Gila River when diverted from said River by means of the necessary canals and laterals.

(c) That said several entrymen in said year 1874 selected a site upon said Gila River for the diversion therefrom of the water of the Gila River and, constructed from said site of di- [532] version, canals and laterals and thereby and therethrough diverted to and upon said lands, entered and settled upon in said year, 1874, as aforesaid, the water of the Gila River, necessary for the irrigation of said

lands, and thereby intended to and did appropriate the water of the Gila River, necessary for the irrigation of all lands situated in said Sections and susceptible of irrigation with water of the Gila River.

(d) That thereafter and on or about the 6th day of March, 1896, one J. A. Martin, a citizen of the United States and an entryman under the laws of the United States on a portion of said lands in last mentioned Sections, in furtherance of said original appropriation of the year 1874 and for the use and benefit of all of said lands situated in last mentioned Sections, appropriated 50,000 cubic inches, or approximately 21,000 acre feet per annum, of the water of the Gila River to be used for the necessary irrigation of said lands situated in Township 19 South, Range 20 West, and in Township 19 South, Range 21 West, New Mexico Principal Meridian, and in conformity with the laws applicable thereto, posted a notice of said appropriation of said water and intention to divert said water from said Gila River at a place certain designated in said notice, to-wit: at a point on said Gila River 4 chains above the line between Sections 20 and 21 of Township 19 South, Range 20 West, New Mexico Principal Meridian, County of Hidalgo (then Grant), State (then Territory) of New Mexico, and intention to construct and maintain a canal 8 feet wide and 3 feet deep from said point of diversion to and upon last mentioned lands. That said notice

was so posted at said point of diversion and thereafter on the 13th day of May, 1896, filed for record in the office of the County Clerk of Hidalgo (then Grant), State (then Territory) of New Mexico, and placed of record in Book 32, Location Notices, at page 246 thereof, of the official records in the office of said County Clerk. [533]

(e) That said Martin thereafter, with due and reasonable diligence, commenced, and completed, the construction of said canal, known as Sunset Canal, 8 feet in width and 3 feet in depth from said point of diversion through Sections 11 and 7 of said Township 19 South, Range 20 West, and through Sections 12, 1, 2, and 3 of said Township 19 South, Range 21 West, and through Sections 34, 33, 32, and 31 of Township 18 South, Range 21 West, New Mexico Principal Meridian, in said County of Hidalgo (then Grant), State (then Territory) of New Mexico, to and upon said lands, it being the intention that said appropriation and canal were sufficient to satisfy the necessary irrigation requirements of all of said lands, and diverted the water so appropriated through said canal to and upon a considerable portion of said lands for the cultivation and necessary irrigation thereof.

(f) That thereafter and on or about the 8th day of March, 1896, one J. A. Martin, one C. Castlio, and one T. R. Pearson, citizens of the United States and entrymen under the laws of the United States on a portion of said lands designated in paragraph

(a) of this part 5 and for the use and benefit of lands situated in Sections 2, 3, 11, and 12 of Township 19 South, Range 21 West, New Mexico Principal Meridian, appropriated 300 miner's inches, or approximately 4,839 acre feet per annum, of the water of the Gila River, and, in conformity with the laws applicable thereto, posted a notice of said appropriation of said water and intention to divert said water from said Gila River at a place certain designated in said notice, to-wit: the point where the Gila River crosses the North and South center line of Section 18 of Township 19 South, Range 20 West, New Mexico Principal Meridian, in the County of Hidalgo (then Grant), State (then Territory) of New Mexico, and intention to construct and maintain a canal 6 feet in width and 2 feet in depth from said point of diversion of said water to and upon said lands in said Sections 2, 3, 11, and 12 in last mentioned Township 19 South, Range 21 West. That said notice was posted at said point of diversion and thereafter on the 17th day of May, 1898, filed for record in the office of the County Clerk of said County of Hidalgo (then Grant), State (then Terri- [534] tory) of New Mexico, and placed of record in Book 32, Location Notices, at page 623 thereof, of the official records in the office of said County Clerk.

(g) That the said J. A. Martin, C. Castlio, and T. R. Pearson thereafter, with due and reasonable diligence, commenced, and completed, the construc-

tion of said canal, known as M. P. Canal, 6 feet in width and 2 feet in depth from said point of diversion through Section 18 of Township 19 South, Range 20 West, and through Sections 13, 12, 11, 2, and 3 of Township 19 South, Range 21 West, New Mexico Principal Meridian, in said County of Hidalgo (then Grant), State (then Territory) of New Mexico, to and upon said lands, it being the intention that such appropriation and canal were sufficient to satisfy the necessary irrigation requirements of all of said lands in said Sections 2, 3, 11, and 12 of last mentioned Township 19 South, Range 21 West, and diverted the water so appropriated through said canal to and upon a considerable portion of said lands for the cultivation and necessary irrigation thereof.

(h) That thereafter and on or about the 1st day of October, 1896, one Candido Telles, a citizen of the United States and an entryman under the laws of the United States on a portion of said lands designated in paragraph (a) of this part 5, in furtherance of said original appropriation of the year 1874 and for the use and benefit of lands situated in said Sections 18 and 17 of said Township 19 South, Range 20 West, appropriated 17,000 cubic inches, or approximately 7,000 acre feet per annum of the water of the Gila River. That, in conformity with the laws applicable thereto, the said Telles posted a notice of said appropriation of said water and intention to divert said water from said Gila River at a place certain designated in said

notice, to-wit: a point on said Gila River in the Northwest quarter of Section 22, Township [535] 19 South, Range 20 West, New Mexico Principal Meridian, of Hidalgo (then Grant) County, State (then Territory) of New Mexico, and intention to construct and maintain a canal 8 feet in width and one foot in depth from said point of diversion to said lands situated in said Sections 17 and 18 of said Township 19 South, Range 20 West, New Mexico Principal Meridian. That said notice was posted at said point of diversion and on said 1st day of October, 1896, filed for record in the office of the County Clerk of the County of Hidalgo (then Grant), State (then Territory) of New Mexico, and placed of record in Book 32, Location Notices, at page 294 thereof, of the official records in the office of said County Clerk.

(i) That the said Telles thereafter, with due and reasonable diligence, commenced, and completed, the construction of said canal, known as Telles Canal 8 feet in width and 1 foot in depth from said point of diversion through Sections 22, 15, 21, 16, 17, and 18 of said Township 19 South, Range 20 West, New Mexico Principal Meridian, to and upon said lands situated in said Sections 17 and 18 of last mentioned Township 19 South, Range 20 West, it being the intention that said appropriation and canal were sufficient to satisfy the necessary irrigation requirements of all of last mentioned lands, and diverted the water so appropriated through said canal to and upon a considerable por-

tion of said lands for the cultivation and necessary irrigation thereof.

(j) That thereafter and on the 9th day of February, 1903, said entrymen and the then owners of said lands designated in paragraph (a) of this part 5 united in the organization and incorporation of Sunset Ditch Company; that said Sunset Ditch Company now is and at all times since said 9th day of February, 1903, has been a corporation organized under and by virtue of the laws of the State and Territory of New Mexico, and lawfully engaged in [536] the transaction of its corporate business in the State and Territory of New Mexico. That the Articles of Incorporation of said Sunset Ditch Company were filed and placed of record in the office of the County Clerk of the County of Hidalgo (then Grant), State (then Territory) of New Mexico, on said 9th day of July, 1903. That said Sunset Ditch Company was so organized in furtherance of said original appropriation of water of the Gila River in the year 1874, and in furtherance of said appropriation of the water of the Gila River by said J. A. Martin in the year 1896, and in furtherance of said appropriation of the water of the Gila River by said J. A. Martin, C. Castlio, and T. R. Pearson in the year 1896, and in furtherance of the appropriation of water of the Gila River by the said Candido Telles in the year 1896, and for the purpose of providing adequate canals and laterals for the necessary cultivation and irrigation with the water of the Gila River of all of said lands des-

ignated in paragraph (a) of this part 5 and susceptible of irrigation from said Gila River. That Sunset Ditch Company acquired Sunset Canal and said appropriation of the water of the Gila River by the said J. A. Martin, and said M. P. irrigating canal and said appropriation of the water of the Gila River by said J. A. Martin, C. Castlio, and T. R. Pearson, and said Telles Canal and said appropriation of the water of the Gila River by said Candido Telles. That thereafter and on or about the 9th day of February, 1903, said Sunset Ditch Company took over the management and administration and at all times since has managed and administered and, subject to the domination and control of said defendant Virden Irrigation District as herein set forth, does manage and administer all of said appropriations of the water of the Gila River for the use and benefit of the owners and for the cultivation and necessary irrigation of all of the lands designated in paragraph (a) of this part 5, and susceptible of irrigation with the water of the Gila River.

(k) That, beginning with the year 1874, the owners of said lands and of said appropriations of water of the Gila River have used due diligence in the application of said appropriations to said lands and have continuously cultivated said lands from year [537] to year in increasing amounts by the necessary irrigation of the same with the water of the Gila River pursuant to said appropriations thereof, as hereinafter particularized in paragraph

(m) in this part 5, and in connection therewith, have maintained and extended from year to year the said canals and laterals from said point of diversion to and upon said lands as required for the irrigation thereof as aforesaid. That there are now in cultivation as aforesaid of said lands in last mentioned Sections, 1,831.5 acres. That there are and now remain in last mentioned Sections 1,000 additional acres of said lands susceptible of irrigation with the water of said Gila River, pursuant to said appropriations, and which will be reclaimed and placed in cultivation with due and reasonable diligence as rapidly as the water of the Gila River so appropriated shall be available as hereinafter set forth.

(1) That the lands within the last mentioned Sections now cultivated and irrigated and to be cultivated and irrigated, as aforesaid, and said rights of water appropriation are embraced within defendant, Virden Irrigation District, and subject to its management and control.

(m) That the defendant owners of the several parcels of lands situated in last mentioned Sections, the acreage thereof now under cultivation, the Township, Range, and Section in which located, and the year in which the water of the Gila River so appropriated was first applied respectively by said defendants, or their predecessors in interest, to beneficial use upon the several parcels of said land are as follows:

Town- ship	Range	Sec- tion	Description	Acres	Defendant
South	West				
			Year	1874	
*	*	*	*	*	*

Total Acres Sunset

Ditch Company1,831.5

(n) That each of said defendants named in the preceding [538] paragraph (m) of this part 5, or his predecessors in interest, has appropriated not less than 6 acre feet per annum of said water of the Gila River for the necessary irrigation and cultivation of each acre of his, or its, said respective parcels of land described in last mentioned paragraph (m), and has actually diverted the same continuously from year to year from the date of the first application thereof to and upon his, or its, said land, by means of canals and laterals, for the irrigation and cultivation of his, or its, said lands, and has done all things and taken all steps, as required by the law applicable thereto, to perfect and vest, and thereby there has been perfected and vested in him, or it, his, or its, said appropriation of and right to use said water of the Gila River for the use and benefit of his, or its, said land. That by reason of the climatic conditions and the character and situation of such lands, 6 acre feet per annum per acre are reasonably and necessarily required for the adequate cultivation and irrigation of said lands; that each of said defendants, by virtue of said original appropriation, and the diligent application thereof to beneficial use upon the lands, as

aforesaid, is entitled to 6 acre feet per annum of the water of said Gila River for each acre of said lands so owned, cultivated and irrigated, and that said defendants are entitled in the aggregate to 10,989.0 acre feet per annum of said water for lands so owned, cultivated, and irrigated, and in addition thereto, 6 acre feet per annum per acre for said 1,000 acres of said lands remaining to be brought into cultivation, as aforesaid, amounting to 6,000 acre feet per annum, or to a grand total of 16,989.0 acre feet per annum, of the water of said Gila River for the use and benefit of said lands in said last mentioned Sections, now cultivated and irrigated and to be cultivated and irrigated thereby.

* * * * *

Wherefore, these defendants pray:

First, that the Court, by its decree, determine the rights of the parties hereto in and to the waters of the Gila River, and its [539] tributaries, and the rights of said parties to divert water therefrom, to the end that it may be known, how much of said water, may be diverted from said river by the parties hereto and for what purposes, where and by what means of diversion and with what priorities.

Second, that the Court adjudge and decree, that all laws, orders, rules and regulations of the plaintiff, its officers and departments, wherein and whereby plaintiff, or such officers or departments, have sought to withdraw the public domain, and in particular, the bed and banks of the Gila River,

and its tributaries, as and for the purposes aforesaid, each and every, are, as to these defendants, null and void, and in contravention of the Constitution of the United States of America.

Third, that this Court enjoin this plaintiff, its officers and agents, and each of them, from interfering with defendants or any of them, their officers, employees, or agents in entry upon the public domain of the United States of America and in particular upon the bed and banks of the Gila River, and/or its tributaries, for the purpose of initiating, constructing and maintaining works on said Gila River, and/or its tributaries, for the purpose of utilizing the said rights of said defendants in and to the water of said Gila River, and its tributaries, for the cultivation and necessary irrigation of the lands of said defendants, as aforesaid.

ELLIOTT and SHIMMEL,

Of Counsel for said

Defendants.

FRANCIS C. WILSON,

Solicitor for the defendants
claimants of rights to water
of the Gila River and its tributaries
appurtenant to land
situate in Hidalgo County,
New Mexico, above named.

H. A. ELLIOTT,
B. B. SHIMMEL,
A. R. LYNCH,

Solicitors for the defendants
claimants of rights to water
of the Gila River and its trib-
utaries appurtenant to land
situate in Greenlee County,
Arizona, and in Hidalgo
County, New Mexico, above
named. [540]

Admit service of the foregoing Answer to
Amended Bill of Complaint this 5th day of Janu-
ary, 1929.

JOHN G. SARGENT,

The Attorney General of the
United States.

By EDWARD A. SMITH,

Special Assistant to the
Attorney General.

[Endorsed]: Filed Jan. 8, 1929. [541]

[Title of District Court and Cause.]

PETITION IN THE MATTER OF THE PROCEEDINGS AGAINST SUNSET CANAL COMPANY, R. W. BROOKS, PARLEY P. JONES, HIRAM PACE, HANS ANDERSON, et al., AND MOTIONS FOR RULE TO SHOW CAUSE.

Comes now your petitioner, Charles A. Firth, and complains of the Sunset Canal Company, Parley P. Jones, R. W. Brooks and Mrs. Rachael Jensen, individually, and as officers and directors of the Sunset Canal Company, and all other parties named in Paragraphs II, III and IV of this petition:

I.

That heretofore there was filed in this Court, on the Equity side thereof, and numbered "Equity 59-Globe", a suit entitled United States of America as plaintiff vs. Gila Valley Irrigation District, et al. as defendants; that said suit was instituted by the plaintiff, United States of America, for the purpose of adjudicating and determining the priority rights to the use of the waters of the Gila River, and the lands thereunder, entitled to water therefrom, and the amounts thereof in so far as the plaintiff and defendants therein named, and they and their successors in interests were concerned, and for the enforcement of the decree of this Court by an injunction.

II.

That in said suit, the Sunset Canal Company was named defendant therein, for the reason that it had, or claimed, the right to divert, appropriate, distribute and use the waters of said Gila River for the irrigation of land owned and possessed by water users served by the canals, owned or possessed by said company, said defendant being represented in said suit by counsel of record therein. [542]

III.

That at the time of the institution of said suit Parley P. Jones and R. W. Brooks owned, or were in possession of certain lands under said Sunset Canal Company, which land was fully described and set forth in the decree of this Court, in said suit hereinbefore mentioned, which said lands had been and were irrigated by the waters of the said Gila River supplied through said Sunset Canal Company, and they were then and are now directors of said Sunset Canal Company; that Hiram Pace is a director of said Sunset Canal Company, and owns and is in possession of certain lands irrigated from the waters of the Gila River diverted, apportioned and delivered to said lands by said Sunset Canal Company.

IV.

That at the time of the institution of said suit, Hans Anderson, M. M. Allred, S. A. Brown, C. M. Brooks, J. R. Beavers, R. W. Brooks, W. E. Bowers, Florentino Billaba, J. E. Cardon, George H.

Cosper, Jr. (Adm. of the estate of George Cosper, deceased), Carl M. Donaldson, E. G. Davidson, M. B. Echols, Byron Echols, W. F. Foster, R. H. Friestone, Trivio Gonzales, A. C. Gruwell, H. Grandy, B. J. Gale, M. L. Harris, G. Lynn Hatch, R. T. Johns, Willard E. Jones, John B. Jones, Parley P. Jones, T. V. Jones, M. N. Jensen, F. W. Jones, Mary Jane Jones, Delbert Johnson, Rachael Jensen, Milton N. Jensen, A. E. Keller, G. V. Lunt, Owen Lunt, R. H. Lunt, Randall Lunt (Adm. of the estate of Jasper Gale, deceased), Maude Larsen, Anna H. Lunt, Edward Lunt, P. L. Lunt, Alfred Mortensen, Hiram K. Mortensen, James A. Mitchell, Peter Mortensen, O. Mortensen, Hans Mortensen, Fenley F. Merrill, Orson A. Merrill, W. J. Mabin, Mitchell McDonald, R. J. McLaren, Leslie B. Payne, Nancy O. Pace, Junius E. Payne, H. M. Payne, C. Pirtle, G. Q. Payne, J. E. Payne (Trustee of the Church of Jesus Christ of Latter Day Saints), Helen A. Payne, M. D. Patton, E. C. Payne, Ralph [543] Richardson, Orsen J. Richens, R. Richens, E. W. Richens, Henry L. Smith, Florence R. Swofford, Nancy A. Smith, School District #2, County of Hidalgo, State of N. M., E. Thygersen, Mrs. T. M. Williamson, Peter Wahline, and B. Y. Whipple, owned, or were in possession of, certain lands in said project, which are more fully described and set forth in the decree of said Court in said suit, hereinabove mentioned, which said lands had been and were irrigated by the waters of the Gila River supplied through the said Sunset Canal Company.

V.

That thereafter, on June 29, 1935, after due proceedings had been taken therein, a decree of this Honorable Court was made and entered, which decree was approved and signed by all of the parties thereto, or their attorneys of record, which decree determined and set forth the names of the parties entitled to the use of the waters from the Gila River, the points of diversion, the name of the diverting and carrying structure, the description of the lands for which their rights attached, the parties owning said lands when jurisdiction was acquired therein, and the diversion rights. And said decree forever enjoined and restrained each and all of said parties, including all of the parties named herein, who were parties to said suit, and their heirs, successors, administrators and assigns, and all parties to whom rights of water were decreed in said cause, and their assigns and successors in interest, and all parties claiming by, through or under them, their successors from asserting or claiming any right, title or interest in and to said lands or to the waters of the said Gila River, or any part thereof, except the rights specified, determined and allowed by said decree, and each and all of the defendants named in said decree, including the parties herein named, were perpetually restrained and enjoined from diverting, taking or interfering in any way with the waters of said Gila River, or any part thereof, except such rights as were set forth

and determined and allowed in said decree of this Court. [544]

VI.

That after the execution of said decree and in compliance therewith, and before the commission of the acts hereinafter complained of, your petitioner, Charles A. Firth, was duly appointed Water Commissioner by this Court to supervise the distribution of said Gila River waters and to otherwise enforce the terms and conditions of said decree, and he has ever since been, and now is, the duly appointed, qualified and acting Water Commissioner for the purposes set forth in said decree.

VII.

That reference is hereby made to the original bill and amendments thereto, and exhibits filed, the answer and amended answers of the defendants, the testimony taken on both sides, the stipulation of the parties, including the parties named herein, the final decree in the cause, and each and every other paper and proceeding in this cause from the institution of the suit to the filing of this petition, and to the orders of the Court subsequently entered, pursuant thereto, and more particularly to the order of this Court dated the 9th day of December, 1935, a copy of which is attached hereto and made a part hereof for all purposes, and it is prayed that the same be taken and read as a part hereof at any and all hearings of this petition, whether in this Court or on appeal from any decision in this Court, pursuant to this petition.

VIII.

Your petitioner herein alleges that the Sunset Canal Company is and, at the times of the commission of the acts herein complained of, was the owner and operator of the Sunset Canal Company, and the canals known as the Cosper Windham Canal Company, and the Cosper Windham Extension Canal Company, all mentioned and described in the aforementioned decree, and diverts and conveys [545] waters from said Gila River; that the other parties, above named and herein complained of, have, or claim to have, some right or interest in and to those certain lands described and set forth in said decree in the name of said parties, or their predecessors in interest, and all of said parties complained of herein, or their successors in interest, claim the right to the use of the waters of the said Gila River upon the said lands, such water being diverted, as hereinbefore described, through the aforesaid canals; That after the entry of said decree, on the 29th day of June, 1935, your petitioner further alleges that all of the parties herein complained of, and their predecessors and successors in interest, recognized and acknowledged said decree and operated thereunder, and for a long time thereafter, complied with all the provisions and conditions thereof.

IX.

That on the 9th day of December, 1935, the Honorable Albert M. Sames, Judge of the United States

District Court, pursuant to the provisions of said decree, made and entered in said cause a certain order relative to assessments to pay the costs and expenses of the administration of said decree, a copy of which order is hereto attached and made a part hereof and marked "Exhibit A". That all of said costs and expenses for administering said decree for the year 1938, and prior thereto, as provided for in said order have been paid by the parties herein complained of and petitioners and successors in interest. That on or about the first day of January, 1939, and at various and divers times thereafter, affiant made demand on the Sunset Canal Company for the payment of said water assessments levied upon the land owned by the parties herein complained of, or their successors in interest, and located in the State of New Mexico, for the first half of the year 1939, as provided for in said order, and that the said parties have failed and refused [546] to pay such assessments, or any part thereof, and still continue to refuse to pay the same or any part thereof.

X.

That upon the refusal of all the parties herein complained of, to pay the said water assessments for the first half of the year 1939, as provided for in said order, your petitioner closed and locked the diverting structures and headgates on the Sunset Canal owned by the Sunset Canal Company, and, at said time and at divers times thereafter, your petitioner warned the parties herein complained of not

to divert, appropriate or use any of the waters of the Gila River, as set forth in the aforesaid decree of this Court, until such time as they had paid the water assessments provided for in the order, hereinabove referred to, and had complied with all of the conditions of said decree.

That beginning on January 4, 1939, and ever since said date, said parties complained of and their predecessors and successors in interest, notwithstanding their failure to pay the water assessments, as hereinbefore alleged, have, in violation of the said decree and the said order of this Court, diverted, appropriated and used waters of the Gila River, said water being delivered and distributed to said parties through the canals above named.

XII.

That on or about January 4, 1939, at the town of Virden, State of New Mexico, and while your petitioner was pursuing his duties as such Water Commissioner, under the decree of this Court, Thomas McClure, C. B. Tooley and John Bradford, Jr., purporting to be officers of the State of New Mexico and claiming that they were acting under the authority of said State of New Mexico, and in its behalf, made demand upon your petitioner to surrender to them the keys to the locks on the control gates and measuring devices, of the aforementioned canals, located in the State of New Mexico; that your petitioner refused to deliver said keys and that, thereupon, the said Thomas McClure, C. B.

Tooley and [547] *and* John Bradford, Jr., notified your petitioner that they would immediately break said locks and place their own locks upon said gates and measuring devices, and said parties then and there ordered and notified your petitioner to cease his administrative functions, in connection with said Gila River waters in the State of New Mexico, and that, thereafter, a watermaster, appointed by the State of New Mexico, would have full charge of administering the distribution of said waters within the State of New Mexico, and that the distribution of said waters would be administered without regard to the rights of the other parties named in said decree who were not residents of the State of New Mexico or owners of land therein. That thereafter, on the same date, the aforementioned parties wilfully and unlawfully broke, and caused to be broken, the locks on the said measuring devices and replaced same with locks of their own. And, thereupon, opened the gates of the diversion works on the said Sunset Canal thereby causing water to enter said canal and be distributed to the parties herein complained of.

XIII.

That ever since January 4, 1939, and continuously up to the filing of this petition, the said Thomas McClure, C. B. Tooley and John Bradford, Jr., their agents or representatives, have continued to remain in control of said measuring devices and diversion works, and they have diverted, appropriated

and distributed waters of the Gila River to the parties herein complained of. The said parties herein complained of, notwithstanding their failure to pay the water assessments, as hereinbefore alleged, have ever since January 4, 1939, used, and still continued to use the waters so distributed to them in the irrigation of the respective lands in this petition, hereinbefore mentioned and referred to. That all of the acts, above alleged as having been committed by those parties claiming to be officers of the State of New Mexico, were done and performed under the [548] purported claim that said parties were acting in behalf of and for the benefit of the State of New Mexico, but that your petitioner is informed and believes, and, therefore, alleges that all of such acts of the said parties, as above alleged, were done and performed for and on behalf of and as the agents and representatives of the parties herein complained of, and each and all of them.

XIV.

That by reason of the premises, all of the acts of the parties herein complained of, were performed in violation of the provisions of the aforesaid decree and the orders of this Court, duly made and entered in said cause.

Wherefore, your petitioner, Charles A. Firth, prays that a rule issue to each of said parties complained of herein, to show cause why they should not be punished for contempt of this Court for violation of the injunction and provisions of said de-

cree contained, and the orders of said Court made pursuant thereto, and, that upon hearing of said matter, they, and each of them, be punished therefor, and that your petitioner recover his costs and attorneys fees herein expended, and for such other and further relief as the Court may deem meet and just. Your petitioner further prays that the Court fix the manner in which the parties shall be served with process in this proceeding.

FRANK E. FLYNN,
United States Attorney
JOHN C. GUNG'L,
Attorney for Petitioner
H. S. McCLUSKEY,
Of Counsel. [549]

United States of America,
District of Arizona—ss.

Charles A. Firth, being first duly sworn, deposes and says:

That he has read the above and foregoing petition; that he knows the contents thereof, and that the allegations therein set forth are true of his own knowledge, except as to those matters alleged on information and belief, and as to those matters he believes them to be true.

CHARLES A. FIRTH.

Subscribed and sworn to before me this 1st day of September, 1939.

[Seal]

EDWARD W. SCRUGGS,
Clerk, U. S. District Court.

“EXHIBIT A”

[Title of District Court and Cause.]

ORDER.

This cause came on regularly for hearing this 9th day of December, 1935, on order of the Court duly made heretofore for determining the manner and method of providing compensation for the Water Commissioner heretofore appointed by the Court in the above entitled cause, and providing for and authorizing the Water Commissioner to secure assistants, clerical help, office and field equipment. The Court received from the Water Commissioner, C. A. Firth, an estimate of the costs of administering the Gila River decree for the calendar year 1936, a copy of which is attached hereto. The Court having heard counsel for all the principal landowners and the United States Attorney, representing the plaintiff, and being fully advised in the premises,

It is, therefore, ordered that the Water Commissioner establish an office at Safford, Arizona, and he is hereby authorized to employ an assistant for the Duncan and Virden Valley at an annual salary not to exceed \$1500. He is also authorized to employ an assistant for the Safford Valley at an annual salary not to exceed \$1800. He is also authorized to employ an office engineer at an annual salary not to exceed \$2400. The Commissioner is authorized to employ clerical help at approximately \$1800 per year.

The Water Commissioner shall be allowed for his travel expenses and all personal expenses incurred by him as such Water Commissioner the sum of \$1800 per year. He is also authorized to pay to his assistant in the Duncan Valley [551] \$1200 per year as a travel allowance and he is authorized to pay a like allowance to his assistant in the Safford Valley. The Water Commissioner is further authorized to make expenditures specified and indicated in item 3 of his estimate attached hereto.

It is further ordered that all expenses of the Water Commissioner herein authorized shall be paid by the land owners and for that purpose the Water Commissioner is authorized and directed to collect 13¢ for each acre of land for which a water right is given in the decree. The Water Commissioner is further directed to collect said 13¢ per acre from each individual, corporation, or party designated in the decree as the party entitled to divert water from the Gila River under the terms thereof and in each instance where the parties entitled to divert are represented by an irrigation district which is a party to this suit such irrigation district shall be responsible for collecting the said 13¢ per acre and paying it over to the Water Commissioner. The collection of said 13¢ per acre for the lands represented by the United States, whether Indian or non-Indian, shall be collected by the United States of America, the plaintiff herein.

It is further ordered that all parties, save and except the United States of America, shall pay

their share of the Commissioner's expenses in advance, in two equal installments, the first of which shall be made on February 1, 1936, and a second installment of a like amount on the 1st day of July, 1936. Thereafter, semi-annual payments of equal amounts shall be made on the 1st day of January and the 1st day of July, unless otherwise specified by an order of this Court.

It is further ordered that the expenses of the Water Commissioner payable by the plaintiff, the United States of America, shall be paid by the proper United States Government disbursing officer of the Indian Irrigation Service in 12 equal [552] monthly payments, beginning February 1, 1936, which said payments and which said sums shall all be paid in accordance with Government regulations.

The Water Commissioner is ordered and directed to refuse the delivery of water from the Gila River to any party entitled to divert so long as such diverter remains in default in the payment of any of its share of the said 13¢ per acre.

The Commissioner is further ordered and directed to have each party entitled to divert water from the Gila River install at his or its own expense, adequate and substantial headgates with adequate locking facilities and accurate measuring and automatic recording devices on or before March 1, 1936. He shall advise each such diverter as promptly as possible the size, type and proper location of such headgates and measuring and automatic re-

cording devices as he shall deem proper and when any such party shall notify the Commissioner that he or it is ready to make installation thereof the Commissioner shall supervise such installation to the end that accuracy and economy shall be facilitated.

The Commissioner is further directed to prepare and file with the Court, with copies to the interested parties, a full and complete report, certified under oath, showing the daily quantity of water distributed to the respective users and the conditions under which such water was diverted and used, including diversion rates during the period of his administration of the decree up to and including the 31st day of December, 1936, and annually thereafter unless otherwise directed by the Court. Said report shall contain an analysis of his expenditures during said period, also a tabulation and an analysis of all hydrometric data collected relating to the River during said period.

Done in open Court this 9th day of December, 1935.

ALBERT M. SAMES,

Judge, United States District
Court, for the District of
Arizona. [553]

ESTIMATE OF COST FOR THE ADMINISTRATION OF THE GILA RIVER DECREE FOR THE CALENDAR YEAR OF 1935.

1. Personnel (Salaries)

(a) Water Commissioner	\$3600.00
(b) Assistant for Duncan and Virden	1500.00
(c) Assistant for Safford Valley.....	1800.00
(d) Office Engineer	2400.00
(e) Clerical Help	1800.00

\$11,100.00

2. Travel Allowance

(a) Water Commissioner	\$1800.00
(b) Duncan Assistant	1200.00
(c) Safford Assistant	1200.00

\$4,200.00

3. Expense :

(a) Office Rent	\$ 300.00
(b) Telephone	50.00
(c) Office Equipment	1000.00
(d) Stationery, Workmen's Compensation, Long Distance Telephones, Telegraph and Miscellaneous	1050.00
(e) Current Meters, Hydraulic Rules, Boots, etc.....	1000.00

\$3,400.00

Total.....\$18,700.00

On an estimate of 146,562 acres in the Decree with an assessment of 13¢ per acre would net \$19,053.06.

[Endorsed]: Filed Sep. 9, 1939. [554]

[Title of District Court and Cause.]

MOTION FOR RULE TO SHOW CAUSE

In the matter of the proceedings against Hans Anderson, et al.

For Contempt of Court

Comes now Frank E. Flynn, United States Attorney for the District of Arizona, and, as such United States Attorney, moves this Honorable Court for a rule against the above named parties, and each of them, to show cause why they, and each of them, should not be punished for contempt of this Court upon the grounds set forth in the petition heretofore filed by Charles A. Firth, the duly appointed, qualified and acting Water Commissioner in the above-entitled action, which petition is hereby referred to and made a part of this motion.

Dated at Tucson, Arizona, September 9, 1939.

FRANK E. FLYNN,

United States Attorney.

[Endorsed]: Filed Sep. 9, 1939. [555]

[Title of District Court and Cause.]

ORDER GRANTING MOTION UPON CONTEMPT

In the matter of the proceedings against Hans Anderson, et al.

For Contempt of Court

Upon petition of Charles A. Firth, the duly appointed, qualified and acting Water Commissioner

in the above-entitled action, and upon motion of Frank E. Flynn, United States Attorney for the District of Arizona.

It is hereby ordered that a rule be issued on the above-named parties, and each of them, to appear before this Court at Tucson, Arizona, at the hour of 10:00 o'clock A. M., on the 25th day of September, 1939, then and there to show cause, if any there be why they should not be punished for contempt of this Court for the violation of the decree and orders of this Court heretofore made and duly entered in this cause.

It is further ordered that a copy of such rule, together with copy of petition of Charles A. Firth, Water Commissioner, heretofore filed, be served by the United States Marshal for the District of Arizona upon each of the above-named parties found within the District of Arizona, and due return of said service be filed by the Marshal herein.

It is further ordered that a copy of such rule, together with copy of petition of Charles A. Firth, Water [556] Commissioner, heretofore filed herein, be served by the United States Marshal of the District of New Mexico upon each of the above-named parties found within the said District of New Mexico, and that due return of said service, verified by said United States Marshal be filed herein.

Dated at Tucson, Arizona, September 9th, 1939.

ALBERT M. SAMES,

United States District Judge,
District of Arizona.

[Endorsed]: Filed Sep 9, 1939. [557]

[Title of District Court and Cause.]

RULE TO SHOW CAUSE

In the matter of the proceedings against Hans Anderson, M. M. Brooks, J. R. Beavers, et al.

For Contempt of Court.

The President of the United States of America:
To Hans Anderson, et al, Greeting:

You and each of you are cited and admonished to appear before the District Court of the United States for the District of Arizona, in the City of Tucson, Arizona, on the 25th day of September, 1939, at the hour of 10:00 o'clock A. M. on said day, and then and there show cause, if any you have, why you, and each of you, should not be punished for contempt of Court for failure to obey and comply with the provisions and conditions of the decree and orders of this Court, heretofore duly made and entered in the above-entitled cause.

It is further ordered that a copy of this order, together with copy of petition of Charles A. Firth, Water Commissioner, heretofore filed, be served by the United States Marshal for the District of Arizona upon each of the above named parties found within the District of Arizona, and due return of said service be filed by the Marshal herein.

It is further ordered that a copy of this order, together with copy of petition of Charles A. Firth, Water Commissioner, heretofore filed herein, be served by the United States Marshal of the District of New Mexico upon [558] each of the above-named

parties found within the said District of New Mexico, and that due return of said service verified by said United States Marshal be filed herein.

Witness, the Honorable Albert M. Sames, Judge of said District Court, and my hand and seal of said Court this 9th day of September, 1939.

[Seal]

EDWARD W. SCRUGGS,

Clerk, District Court of the
United States, District of
Arizona. [559]

RETURN ON SERVICE OF WRIT

No. E-59-Globe.

United States of America,
District of Arizona—ss.

I hereby certify and return that I served the annexed Rule to Show Cause on the therein-named R. W. Brooks, Edward Lunt, George H. Cospers, Jr., M. M. Allred and A. C. Gruwell by handing to and leaving a true and correct copy thereof with a true and correct copy of the Rule to Show Cause therein mentioned, to each personally at Duncan and Vicinity in said District on the 11 & 12 day of September, A. D. 1939.

B. J. McKINNEY,

U. S. Marshal.

By JOHN G. SNEDDEN,

Deputy.

Government Printing Office 7-279

[Endorsed]: Filed Sep. 18, 1939. [560]

[Title of District Court and Cause.]

RULE TO SHOW CAUSE

In the matter of the proceedings against Hans Anderson, M. M. Brooks, J. R. Beavers, et al.

For Contempt of Court.

The President of the United States of America:
To Hans Anderson, et al., Greeting:

You and each of you are cited and admonished to appear before the District Court of the United States for the District of Arizona, in the City of Tucson, Arizona, on the 25th day of September, 1939, at the hour of 10:00 o'clock A. M. on said day, and then and there show cause, if any you have, why you, and each of you, should not be punished for contempt of Court for failure to obey and comply with the provisions and conditions of the decree and orders of this Court, heretofore duly made and entered in the above-entitled cause.

It is further ordered that a copy of this order, together with copy of petition of Charles A. Firth, Water Commissioner, heretofore filed, be served by the United States Marshal for the District of Arizona upon each of the above named parties found within the District of Arizona, and due return of said service be filed by the Marshal herein.

It is further ordered that a copy of this order, together with copy of petition of Charles A. Firth, Water Commissioner, heretofore filed herein, be served by the United States Marshal of the District

of New Mexico upon each of the above-named parties found within the said District of New Mexico, and that due return of said service [561] verified by said United States Marshal be filed herein.

Witness, the Honorable Albert M. Sames, Judge of said District Court, and my hand and seal of said Court this 9th day of September, 1939.

[Seal]

EDWARD W. SCRUGGS,

Clerk, District Court of the
United States, District of
Arizona. [562]

Marshal's Docket No. 1978 Civil

Department of Justice

United States Marshal

District of New Mexico

MARSHAL'S RETURN

I hereby certify and return that on the 22 day of September, 1939, I received a copy of Petition, Order, Order granting Motion Upon Contempt and Rule to Show Cause for Contempt of Court, Service for the District of Arizona, in the case of United States of America vs. Gila Valley Irrigation District, et al. In the Matter of the proceedings against Sunset Canal Company, R. W. Brooks, et al., and motions for Rule to Show Cause, and I served same on:

Maude Larsen (Name)

Bluewater, N. M. (Place)

Sept. 22, 1939 (Date)

Marshal's Fees:

Service	\$2.00
Mileage	4.80
Total	<u>\$6.80</u>

FELIPE SANCHEZ Y BACA,
United States Marshal for the
District of New Mexico.

By D. F. MOLLICA,
Deputy. [563]

[Title of District Court and Cause.]

I hereby certify that the following named Defendants in the above entitled cause were served on the date, at the place and in the manner hereinafter stated:

W. J. Mabin—9/16/39—Deming, N. M.
E. C. Payne—9/16/39—Lordsburg, N. M.
R. W. Brooks—9/18/39—Virden, N. M. (Director
of Sunset Canal Co.)
Byron Echols—9/18/39—Virden, N. M.
G. Lynn Hatch—9/18/39—Virden, N. M.
R. T. Johns—9/18/39—Virden, N. M.
John B. Jones—9/18/39—Virden, N. M.
T. V. Jones—9/18/39—Virden, N. M.
Mary Jane Jones—9/18/39—Virden, N. M.
Milton N. Jensen—9/18/39—Virden, N. M.
Anna H. Lunt—9/18/39—Virden, N. M.
P. L. Lunt—9/18/39—Virden, N. M.
Orson A. Merrill—9/18/39—Virden, N. M.

Orson J. Richens—9/18/39—Virden, N. M.

Ralph Richardson—9/18/39—Virden, N. M.

Florence R. Swofford—9/18/39—Virden, N. M.

Nancy A. Smith—9/18/39—Virden, N. M.

B. Y. Whipple—9/18/39—Virden, N. M.

Hans Mortensen—9/18/39—Virden, N. M.

Carl M. Donaldson—9/18/39—Virden, N. M. (By leaving a copy at his home with his wife)

Rachel Jensen—9/18/39—Virden, N. M. (Individually and as Secretary of the Sunset Canal Company Board)

Finley F. Merrill—9/18/39—Virden, N. M. (Leaving copy with his wife) [564]

Leslie B. Payne—9/18/39—Virden, N. M. (Left Writ at his home with wife)

Junius E. Payne—9/18/39—Virden, N. M. (Left Writ at his home with wife)

H. M. Payne—9/18/39—Virden, N. M. (Left Writ at his home with wife)

J. E. Payne—9/18/39—Virden, N. M. (Individually and as Trustee of the Church of Jesus Christ of the Latter Day Saints)

Hiram Pace—9/18/39—Virden, N. M. (Individually and as a Director of the Sunset Canal) (Left at his home with wife)

School District #2, County of Hidalgo, State of New Mexico, L. B. Payne, Chairman—9/18/39—Virden, N. M.

Parley P. Jones—9/18/39—Virden, N. M. (Individually and as Director of the Sunset Canal Co.) (By leaving Writ with his wife)

Willard E. Jones—9/18/39—Virden, N. M. (By leaving Writ at his home with wife)

R. Richens (Rachel Richens)—9/18/39—Lordsburg, N. M. (By leaving Writ at her home with her daughter, Mrs. Edith Walters)

Henry L. Smith—9/18/39—Virden, N. M. (By leaving Writ at his home with his daughter, Edith Smith)

E. Thygerson—9/18/39—Virden, N. M. (By leaving Writ at his home with his housekeeper, Mrs. P. W. Rynhardt)

FELIPE SANCHEZ Y BACA,
United States Marshal for the
District of New Mexico.

By DENNIS RUTLAND,
Deputy. [565]

[Title of District Court and Cause.]

I hereby certify that the following named defendants in the above entitled cause could not be located in my District, therefore no services were made and according to the best information available in that locality some of the addresses are unknown and some are deceased, as follows:

Hans Anderson—Moved to California.

M. M. Allred—Duncan, Arizona.

S. A. Brown—Deceased.

C. M. Brooks—Deceased.

J. R. Beavers—Deceased.

W. E. Bowers—3726 Morehead St., El Paso, Texas.

Florentino Billaba—Deceased.

J. E. Cardon—Moved to Colorado.

George H. Cospers, Jr., Administrator of Estate of George Cospers, Deceased—Duncan, Arizona.

E. G. Davidson—Deceased.

M. B. Echols—Deceased.

W. F. Foster—Some place in Arizona.

R. H. Friestone—Deceased.

Trivio Gonzales—Deceased.

A. C. Gruwell—Duncan, Arizona.

H. Grandy—Sheriff at Clifton, Arizona.

B. J. Gale—Deceased.

M. L. Harris—Gone.

N. M. Jensen—Not located.

F. W. Jones—Deceased.

A. E. Keller—Deceased. [566]

G. V. Lunt—Utah & Edward Lunt not located.

Owen Lunt—Deceased.

R. H. Lunt—Morenci, Arizona.

Randall Lunt—Morenci, Arizona (Adm. estate of Jasper Gale, Dec.)

Maude Larsen—Bluewater, N. M.—Served by Deputy Mollica out of Gallup, N. M.)

Alfred Mortensen—Tucson, Arizona.

Hiram K. Mortensen—Moved to California.

James A. Mitchell—Moved to California.

Peter Mortensen—Deceased.

O. Mortensen—Deceased.

Mitchel McDonald—Deceased.

R. J. McLaren—Deceased.

Nancy O. Pace—Thatcher, Arizona.

C. Pirtle—Moved to California.

G. Q. Payne—El Paso, Texas.

Helen A. Payne—Deceased.

M. D. Patton—Provo, Utah.

E. W. Richens—3211 Idilia St., El Paso, Texas.

Mrs. T. M. Williamson—Duncan, Arizona.

Peter Wahline—Deceased.

Sept. 18, 1939.

FELIPE SANCHEZ Y BACA,

U. S. Marshal, Dist. of N. Mex.

By DENNIS RUTLAND. [567]

[Endorsed]: Filed Oct. 23, 1939. [568]

[Title of District Court and Cause.]

MOTION FOR RULE TO SHOW CAUSE

In the matter of the proceedings against Hans Anderson et al.

For Contempt of Court

Comes now Frank E. Flynn, United States Attorney for the District of Arizona, and, as such United States Attorney, moves this Honorable Court for a rule against Sunset Canal Company, R. W. Brooks, Parley P. Jones, Hiram Pace and Mrs. Rachel Jensen, individually and as officers and

directors of Sunset Canal Company, and each of them, to show cause why they, and each of them, should not be punished for contempt of this Court upon the grounds set forth in the petition heretofore filed by Charles A. Firth, the duly appointed, qualified and acting Water Commissioner in the above-entitled action, which petition is hereby referred to and made a part of this motion.

Dated at Prescott, Arizona, September 14, 1939.

FRANK E. FLYNN,
United States Attorney.

[Endorsed]: Filed Sep. 14, 1939. [569]

[Title of District Court and Cause.]

ORDER GRANTING MOTION
UPON CONTEMPT

In the matter of the proceedings against Hans Anderson et al.

For Contempt of Court

Upon petition of Charles A. Firth, the duly appointed, qualified and acting Water Commissioner in the above-entitled action, and upon motion of Frank E. Flynn, United States Attorney for the District of Arizona.

It Is Hereby Ordered that a rule be issued on Sunset Canal Company, R. W. Brooks, Parley P. Jones, Hiram Pace and Mrs. Rachel Jensen, indi-

vidually and as officers and directors of Sunset Canal Company, and each of them, to appear before this Court at Tucson, Arizona, at the hour of 10:00 A.M., on the 25th day of September, 1939, then and there to show cause, if any there be, why they should not be punished for contempt of this Court for the violation of the decree and orders of this Court heretofore made and duly entered in this cause.

It Is Further Ordered that a copy of such rule, together with copy of petition of Charles A. Firth, Water Commissioner, heretofore filed, be served by the United States Marshal for the District of Arizona upon each of the above-named parties found within the District of Arizona, and due return of said service be filed by the Marshal herein. [570]

It Is Further Ordered that a copy of such rule, together with copy of petition of Charles A. Firth, Water Commissioner, heretofore filed herein, be served by the United States Marshal of the District of New Mexico upon each of the above-named parties found within the said District of New Mexico, and that due return of said service, verified by said United States Marshal, be filed herein.

Dated at Prescott, Arizona, September 14, 1939.

ALBERT M. SAMES,

United States District Judge, District of Arizona.

[Endorsed]: Filed Sep. 14, 1939. [571]

[Title of District Court and Cause.]

RULE TO SHOW CAUSE

In the Matter of the proceedings against Hans Anderson, et al.

For Contempt of Court.

The President of the United States of America:
To Sunset Canal Company, R. W. Brooks, Parley
P. Jones, Hiram Pace and Mrs. Rachel Jensen,
individually and as officers and directors of
Sunset Canal Company, Greeting:

You and each of you are cited and admonished to appear before the District Court of the United States for the District of Arizona, in the City of Tucson, Arizona, on the 25th day of September, 1939, at the hour of 10:00 o'clock A.M., on said day, and then and there show cause, if any you have, why you, and each of you, should not be punished for contempt of Court for failure to obey and comply with the provisions and conditions of the decree and orders of this Court, heretofore duly made and entered in the above-entitled cause.

It is further ordered that a copy of this order, together with copy of petition of Charles A. Firth, Water Commissioner, heretofore filed, be served by the United States Marshal for the District of Arizona, and due return of said service be filed by the Marshal herein.

It is further ordered that a copy of this order, together with copy of petition of Charles A. Firth, Water Commissioner, heretofore filed herein, be

served by the United States Marshal of the District of New Mexico upon each of the above-named parties found within the said District of New Mexico, and that due return of said service verified by said United States Marshal, be filed herein. [572]

Witness, the Honorable Albert M. Sames, Judge of said District Court, and my hand and seal of said Court this 14 day of September, 1939.

[Seal] EDWARD W. SCRUGGS,
Clerk, District Court of the United States for the
District of Arizona. [573]

Department of Justice
United States Marshal
District of New Mexico

[Title of Cause.]

I hereby certify that the following *name* defendants, in the above *entitled* cause, were served with rule to show cause, in the matter of proceedings against Hans Anderson et al. for Contempt of Court, on the dates, at the places and in the manner hereinafter stated.

R. W. Brooks, Sept. 21-1939 at Virden N. M. (Individally and as Director of the Sun Set Canal Company.)

Parley P. Jones, Sept. 21-1939 at Virden N. M. (Individally and as Director of Sun Set Canal Company.)

Hiram Pace, Sept. 21-1939, (Individally and as Director of Sun Set Canal Company).

Mrs. Mrs. Rachael Jensen, Sept. 21-1939, (Individually and as Secretary of the Sun Set Canal Company).

Sun Set Canal Company, Sept. 21-1939, at Virden N. M. by Serving Parley P. Jones, President of Board of *Disrectors*.

FELIPE SANCHEZ Y BACA,

U. S. Marshal, Dist. of New Mexico.

By DENNIS RUTLAND,

Deputy.

[Endorsed]: Filed Oct. 23, 1939. [574]

[Title of District Court and Cause.]

AMENDED RETURN TO ORDER TO SHOW
CAUSE

Comes now R. W. Brooks in his own behalf only and makes this his Amended Return to the Order to Show Cause heretofore issued in the above-entitled matter, and respectfully shows to the court:

1.

That he admits the allegations contained in paragraph 1 of the petition, except that he respectfully alleges and shows to the court that the amended complaint in said cause, in response to which the decree in said cause was entered, and the decree itself discloses that said suit was an action by the plaintiff, the United States of America, to quiet the title of the United States to its claim in and to

the waters of the Gila River in the States of Arizona and New Mexico.

2.

Answering paragraph 2, this answering defendant is informed and believes and upon such information and belief alleges and says that there is not now and never has been a corporation known as the Sunset Canal Company engaged in any kind of business whatsoever in the State of New Mexico, nor has any such corporation ever had or claimed the right to divert, appropriate or distribute or use the waters of the Gila River for irrigation of lands owned and possessed by water users, or otherwise, as alleged in paragraph 2 of said petition. [575]

And further answering said paragraph, on information and belief this answering defendant alleges that there was organized in the State of New Mexico for the purpose of acting as common carrier of waters of the Gila River in Hidalgo County, New Mexico a corporation known and designated as the Sunset Ditch Company, but denies that said corporation had any power under its charter to appropriate the waters of said river and denies that it ever attempted so to do, and further alleges and says that the charter of said Sunset Ditch Company was forfeited by an act of the legislature of New Mexico in the year 1921 and has no longer any corporate existence whatsoever, and further that such forfeiture was worked before the date of the decree in this cause and before the date of the filing of the complaint by the plaintiff in this cause, and denies

that there was any corporation in existence at the date of the filing of this suit or at the date of appearance by counsel for said alleged company having corporate existence on said date with power to or which attempted to appropriate waters of the Gila River and denies that the Sunset Ditch Company had any corporate existence at the time of the entry of the decree or at the time that counsel for the defendants in this cause appeared in behalf of the Sunset Ditch Company.

3.

Defendant admits that he owned and was in possession of certain lands under the Sunset Canal which were fully described and set forth in the decree of this court, as alleged in paragraph 3 of said petition, which said lands had been and were irrigated by the waters of the Gila River supplied through the Sunset Canal, and further answering said paragraph alleges and says that there was never any corporation existing in the State of New Mexico known as the Sunset Canal Company, nor has this answering defendant ever been a director of the Sunset Canal Company, and further answering said paragraph the defendant says that there has been [576] incorporated under the laws of the State of New Mexico a corporation known as the Sunset Ditch Company, which said corporation forfeited its charter under the laws of the State of New Mexico and by an act of the legislature thereof prior to the date of the institution of this suit and

which said corporation never had power under its charter to appropriate the waters of any river in New Mexico.

4.

This answering defendant denies each and every allegation contained in paragraph 4 of said petition.

Further answering said paragraph this answering defendant denies that any water was ever supplied to anyone by the Sunset Canal Company, or that there ever was a company known as the Sunset Canal Company in the State of New Mexico with power to appropriate the waters of the said river or with any other powers, or that *ny* such named company ever had any corporate existence in the State of New Mexico.

Further answering paragraph 4, on information and belief this answering defendant alleges and shows to the court that the following named defendants were either dead before the date of said decree and before the date of the filing of this action and before the date of their entry of appearance by counsel, or have died, sold their property or moved from the Virden District in Hidalgo County, New Mexico, and did not use or attempt to use any of the waters of the Gila River during the year 1939:

M. M. Allred

J. E. Cardon

George H. Cospers, Jr. (Adm. of the Estate of
George Cospers, deceased)

W. F. Foster

R. H. Friestone

A. C. Gruwell
Edward Lunt
Hiram K. Mortensen
James A. Mitchell
W. J. Mabin
C. Pirtle
M. D. Patton
Mrs. T. M. Williamson
Peter Wahlin
S. A. Brown
C. M. Brooks
J. R. Beavers
Florentino Billaba
E. G. Davidson
M. B. Echols
Trivio Gonzales
F. W. Jones
Delbert Johnson
A. E. Keller
Owen Lunt
Peter Mortensen
O. Mortensen
Mitchell McDonald
R. J. McLaren
Helen A. Payne [577]

5.

This defendant admits the allegations of paragraph 5 of the petition, but denies that this court had jurisdiction of the lands or water rights of the defendants in New Mexico.

6.

In answer to paragraph 6, this defendant admits the allegations contained in paragraph 6 of the petition, except that he denies that Charles A. Firth, so far as the lands and waters of the Gila River situated in New Mexico are concerned, was the duly appointed Water Commissioner, and denies that the court had jurisdiction to appoint said Firth to administer any of the water situated outside of the District of Arizona and in the State of New Mexico.

7.

In answer to paragraph 7, this answering defendant is advised by counsel and verily believes and therefore alleges that all of the documents referred to in paragraph 7 are immaterial to the issues tendered by the petition in this matter for the reason that the decree and the orders supplementary thereto heretofore made and entered in this cause so far as they affect this answering defendant are void and of no force and effect.

8.

In answer to paragraph 8, this answering defendant denies that the Sunset Canal Company is or ever has been the owner and operator of the Sunset Canal, or the owner of the canals known as Cosper Windham or Cosper Windham Extension canal, or that it diverts and conveys water from the Gila River, but admits that this answering defendant claims an interest in and to certain [578] lands

described and set forth in the said decree and in this connection alleges and says that many of the other parties mentioned and described in said paragraph 7, whose names are otherwise set forth in this return, have died or sold out and did not use the waters of the Gila River during the year 1939.

9.

In answer to paragraph 9, this answering defendant denies that there has ever existed a corporation known as the Sunset Canal Company described as such in the original decree, or that any canal company ever filed upon or had the right to divert water from the Gila River in New Mexico, and in this connection alleges and says that the rights of the users of the waters of the Gila River in Hidalgo County, New Mexico, are individual rights filed and claimed by the owners thereof and allowed by the State Engineer of the State of New Mexico under and pursuant to the statutes of the State of New Mexico.

10.

Answering paragraph 10, this answering defendant denies that any demand was ever made upon him personally for said water assessments mentioned and described in said paragraph, and denies that the Sunset Canal Company or any corporate canal company owns diverting structures or head-gates as mentioned and described in paragraph 10 of the petition.

11.

Answering paragraph 11, this answering defendant alleges that he is advised by counsel and believes, and therefore charges the fact to be that this court was without jurisdiction to enter said decree regulating the use of the waters of the Gila River and appointing a water master to administer the same outside the jurisdiction of said court and within the jurisdiction of the State of New Mexico, without the consent and against the will of the State of New Mexico. [579]

12.

That this defendant is informed and believes and upon such information and belief alleges as follows: that he admits the allegations set forth in paragraph 12 of said petition except that this answering defendant denies that Thomas M. McClure, or any other person, informed the petitioner herein that the waters of the Gila River would be administered without regard to the rights of other parties named in the decree mentioned in said paragraph who are not residents of the State of New Mexico or owners of land therein, and this answering defendant further denies that Thomas M. McClure, C. B. Tooley and John Bradford, Jr., wilfully and unlawfully broke and caused to be broken the locks on the measuring devices and replaced the same with locks of their own, as alleged in said paragraph, but on the contrary alleges and says that Thomas M. McClure is the State Engineer of the State of New

Mexico duly appointed by the Governor of the State of New Mexico and was at the times mentioned and described in said paragraph the duly qualified State Engineer of the State of New Mexico; that C. B. Tooley was at all times mentioned in said paragraph the duly appointed water master of the Gila River in the State of New Mexico; and that John Bradford, Jr., at all times mentioned in said paragraph was a member of the State Police of the State of New Mexico, duly appointed, qualified and acting as such, and further that all the things mentioned and done in paragraph 12 of said petition were done and performed by the said Thomas M. McClure, C. B. Tooley, and John Bradford, Jr., and each of them, acting in their official capacities and under orders of the Chief Executive, the Governor of the State of New Mexico, in his, the said Governor's exercise of the sovereign powers of the State of New Mexico over the Gila River within the boundaries of the State of New Mexico, and further that said [580] Gila River, within the State of New Mexico, is a perennial stream and title to the waters thereof are now and were at all times mentioned in the plaintiff's petition vested in the sovereign State of New Mexico, and that this answering defendant owns and has acquired water rights or the usufruct of the waters of the said river by virtue of his compliance with the appropriation laws of the State of New Mexico and by placing the said waters to beneficial use on his lands in said state.

Further answering said paragraph this answering defendant alleges that Thomas M. McClure, State Engineer of the State of New Mexico, the same person mentioned and described in the plaintiff's petition, exercising his lawful authority under the statutes of the State of New Mexico, made an order on the 31st day of December, 1938, creating a water district on the Gila River, which included the lands and the water rights of this answering defendant, a copy of which order is hereto annexed, marked "Exhibit A," and prayed to be taken as a part of this return, and further that on the same date Thomas M. McClure, the person mentioned and described in said paragraph of the petition then and there in the lawful exercise of his authority under the statutes of the State of New Mexico did make and enter an order appointing C. B. Tooley as water master on the lower Gila River, which included the lands of this answering defendant described in the original decree in this cause, a copy of which order appointing said water master is hereto annexed, marked "Exhibit B," and prayed to be taken as a part of this answer.

13.

This answering defendant admits the allegations contained in paragraph 13, except that he denies that Thomas M. McClure, C. B. Tooley and John Bradford, Jr., or either or any of them, acted as his agent, as alleged in said paragraph or [581] otherwise, but on the contrary alleges and says that

said Thomas M. McClure was at all times mentioned in said petition the duly appointed, qualified and acting State Engineer of the State of New Mexico; that C. B. Tooley was at all times mentioned in said petition the duly appointed, qualified and acting water master of the lower Gila River in the State of New Mexico, and that said John Bradford, Jr., was at all times mentioned in said petition a duly appointed, qualified and acting State Police Officer, and that the acts and things done and complained of in paragraph 13 were done under and pursuant to an order of the Governor of the State of New Mexico as Chief Executive of said state in the exercise of the lawful sovereignty of the State of New Mexico over the waters of the Gila River, a perennial stream, a copy of the order under which said Thomas M. McClure, C. B. Tooley and John Bradford, Jr., did and performed the acts complained of in paragraph 13 of said petition, signed by the Governor of the State of New Mexico, and delivered to them and in their possession at the time said acts were done and performed is hereto annexed, marked "Exhibit C," and prayed to be taken as a part of this answer, and this answering defendant specifically denies that said last mentioned persons are now or have ever been his agents, but on the contrary alleges and says that each and all of them are state officers over whom this answering defendant has no power, control or direction now or ever heretofore.

14.

That this defendant denies each and every allegation contained in paragraph 14 of said petition, and further denies that this answering defendant ever violated or intended to or attempted to violate any order of this court.

Further answering said petition, this answering defendant respectfully shows to the Court:

A.

That heretofore, on the 21st day of December, 1938, the [582] New Mexico Interstate Stream Commission, a legal entity under the laws of the State of New Mexico charged and entrusted with the protection, preservation and conservation of the rivers of the State of New Mexico, passed a resolution, a copy of which resolution is hereto annexed, marked "Exhibit D," and prayed to be taken as a part of this answer, and further that on the 28th day of December, 1938, Thomas M. McClure, State Engineer of the State of New Mexico, addressed to the petitioner, Charles A. Firth, to this Honorable Court, and to the Governor of the State of Arizona, a letter inclosing a copy of said resolution, a copy of which letter is hereto attached, marked "Exhibit E," and prayed to be taken as a part of this answer.

B.

Further answering said petition this answering defendant respectfully shows to the Court that he has never at any time disobeyed any order of this

Court mentioned and described in the petition, or any other order.

C.

Further answering said petition this answering defendant is informed and believes and upon such information and belief states the fact to be that the said Thomas M. McClure and the water master appointed by him under and pursuant to the authority vested in him by the statutes of the State of New Mexico have administered the waters of said river during all the times mentioned and described in the petition in a fair and equitable manner and have released the waters of said river for the use and benefit of residents of the State of Arizona as and when requested by them under and pursuant to the terms of said decree, except that said releases of water were made after the vested rights of water users in the State of New Mexico had first been fulfilled and satisfied.

D.

This answering defendant further shows to the court that it is impossible to enforce the decree in this cause for the reason that this court never obtained jurisdiction of the lands or water rights appurtenant thereto in the State of New [583] Mexico, and further that since the institution of this suit approximately half of the lands and water rights appurtenant thereto described in the decree herein have passed into the hands of, and title has been obtained thereto by, persons not parties to

the decree or to this cause of action, and that said last mentioned persons are entitled at all times to take water from the river without regard to the terms of said decree, and said decree therefore cannot be enforced as to this answering defendant, and further that in the normal process of nature each and all of the above-named defendants, except the Sunset Canal Company (which never existed) and the Sunset Ditch Company (which is already dead) will die and pass beyond the jurisdiction of this court, and inevitably with the lapse of time all the lands will be owned or possessed by persons not bound by this decree, and further that the State of New Mexico, exercising its sovereign jurisdiction over the Gila River, has taken the possession of the administration thereof and administered the same since the 3d day of January, 1939, and C. A. Firth, Water Commissioner, has performed no labor or services to earn the 13¢ per acre fixed by the court's order, and it now appears that the State of New Mexico was not made a party to this cause and is not bound by the decree herein made, and this answering defendant is advised by counsel and alleges that the State of New Mexico is an indispensable party without whose presence as a party defendant in this litigation this court was without power to do complete and final justice without affecting the rights of the State of New Mexico, and said decree lacks finality and further the presence of the State of New Mexico was necessary in equity and good conscience.

Wherefore, this answering defendant respectfully prays to the Court that said petition be dismissed and that this defendant be discharged.

R. W. BROOKS [584]

L. P. McHALFFEY

Lordsburg, New Mexico

H. VEARLE PAYNE

Lordsburg, New Mexico

Albuquerque, New Mexico

A. T. HANNETT

Albuquerque, New Mexico

State of New Mexico,
County of Hidalgo—ss.

R. W. Brooks, being first duly sworn, upon his oath deposes and says: That he is one of the defendants in the above-entitled action; that he has read the foregoing Return to Order to Show Cause as amended, knows the contents thereof and that the same is true of his own knowledge, except as to those matters alleged on information and belief, and as to those he believes them to be true.

R. W. BROOKS

Subscribed and sworn to before me this 30th day of October, 1939.

[Seal]

RUTH E. WOOD,

Notary Public.

My commission expires: Jan. 3, 1940. [585]

EXHIBIT A

State of New Mexico,

County of Santa Fe,

In the Office of the State Engineer

In the Matter of a Water District for the Gila
River Stream System, Hidalgo County, New
Mexico.

ORDER CREATING DISTRICT

This matter coming in for consideration of the State Engineer pursuant to instructions given him by resolution of the Interstate Stream Commission for the State of New Mexico, said resolution being passed at meeting of said Commission on December 21, 1938, and it further

Appearing to the State Engineer that the administration of a certain decree of the United States District Court for Arizona insofar as the State of New Mexico is concerned and its proprietary interests in the waters of the Gila River, that the court acted without jurisdiction, and it is the purpose of the undersigned, to exercise his jurisdiction over the waters of the Gila River in New Mexico;

Now, Therefore, It Is Ordered that all the Gila River System in Hidalgo County, New Mexico, be and the same hereby is created and declared to be a water district known and designated as the Lower Gila River Water District for the purpose of

having the waters of said stream system apportioned and distributed by a water master, as provided by the Statutes of the State of New Mexico.

Done at Santa Fe, New Mexico, this 31st day of December, 1938.

[Seal] (Signed) THOMAS M. McCLURE,
State Engineer. [586]

EXHIBIT B

Office of State Engineer,
County of Santa Fe,
Santa Fe, New Mexico

ORDER APPOINTING WATER-MASTER

I, Thomas M. McClure, State Engineer of the State of New Mexico, by virtue of the authority vested in me by the laws of the state, do hereby appoint C. B. Tooley as Water-Master of the Lower Gila River District, effective the 1st day of January, 1939, for the purpose of administering, carrying out and enforcing the valid water rights of the Gila River within said district; that said Water-Master shall have all the powers and authority with reference to said water in the aforesaid District and the users thereof as are conferred upon a Water-Master under the provisions of Chapter 151, New Mexico Statutes, 1929 Compilation.

In Witness Whereof, I have hereunto set my hand and official seal this 31st day of December, A. D., 1938.

[Seal] (Signed) THOMAS M. McCLURE,
State Engineer. [587]

EXHIBIT C

January 3, 1939

To the Chief of Police,
Santa Fe, New Mexico

Dear Sir:

Pursuant to a resolution heretofore passed by the Interstate Stream Commission, the State Engineer, Mr. Thomas M. McClure, was instructed to take jurisdiction over the administration of the waters of the Gila River, an interstate stream, and it appearing from said resolution and the records of the said Commission in the State Engineer's office and from other evidence placed before me that a certain C. A. Firth and assistants acting under his direction have assumed unlawful jurisdiction over said stream and are attempting to administer the same without authority and are invading the sovereign proprietary interests in the water of said stream of the State of New Mexico, and it further appearing that although requested by the State Engineer, Mr. Thomas M. McClure, to desist from interfering with the waters of said stream and attempting to administer the same that the said C. A. Firth and his said assistants continue to unlawfully interfere with the State's sovereignty in the waters of said river.

You will, therefore, under the direction of Mr. Thomas M. McClure, State Engineer, cause the said C. A. Firth and his assistants to desist from in any manner attempting to interfere with the waters of

said stream and to administer the same and you will also put said Thomas M. McClure, State Engineer of the State of New Mexico in full possession of the facilities for administering the water of said stream and use such force as may be necessary to evict the said C. A. Firth and his assistants or any other persons interfering with the administration of the waters of the said river by the said State Engineer, and you will, therefore, govern yourself accordingly.

Yours very truly,

(Signed)

JOHN E. MILES [588]

EXHIBIT D

RESOLUTION

Whereas, it has been brought to the attention of the Interstate Stream Commission that in the United States District Court for the District of Arizona in the case of United States v. Gila Valley Irrigation District, et al., entered June 29, 1935, a commissioner or water master has been appointed who is administering the waters of the Gila River outside the jurisdiction of said court and within the boundaries of the State of New Mexico, and

Whereas, it further appears that the Constitution of the State of New Mexico, by the terms of Section 2, Article 16 provides:

“The unappropriated water of every natural stream, perennial or torrential, within the State

of New Mexico, is hereby declared to belong to to the public and to be subject to appropriation for beneficial use, in accordance with the laws of the state. Priority of appropriation shall give the better right."

And it further appearing that neither the United States of America, the State of Arizona, nor any qualified citizen or body corporate of the State of Arizona, nor any of its residents, nor any officers or agents of the United States, have ever filed with the State Engineer of the State of New Mexico any application for, or made appropriation of, the waters of the Gila River, or any of its tributaries as required by the statutes of the State of New Mexico, and

Whereas, it appears that the State of New Mexico was not a party to the litigation and could not be made a party to said litigation wherein said water master was appointed, and it further appearing that said water master is acting, so far as he controls water and performs acts within the State of New Mexico, without lawful authority as against the State of New Mexico and is interfering with the State's sovereignty of its waters within said State, said Gila River being a perennial stream and having a large number of irrigators who have appropriations under the laws of the State of New Mexico, and

Whereas, the interference of said water master so appointed as aforesaid is an invasion of the sov-

ereignty of the State of New Mexico and against the peace and dignity of the State of New Mexico.

Mr. Chavez offered the following resolution and moved its adoption: [589]

“Now, therefore, Be It Resolved that the State Engineer of the State of New Mexico be, and he hereby is, empowered and directed to communicate with the said Commissioner or water master so appointed as aforesaid and advise him to cease interference or exercising any jurisdiction or performing any act touching the use and distribution of the waters of the Gila River within the boundaries of the State of New Mexico, and that upon the refusal of said water master or commissioner to comply with such orders on the part of the State Engineer, the State Engineer be authorized to present this resolution to the Governor of the State of New Mexico, requesting that he exercise his authority as Chief Executive of the State to direct that such measures be taken by the proper officers of the State to enforce this resolution, and the orders of the State Engineer, and

“Be It Further Resolved that a copy of this resolution be sent to the United States District Court for the District of Arizona and to the State Engineer of the State of Arizona.” [590]

EXHIBIT E

“Dear Sir:

“Pursuant to instructions given me by resolution of the Interstate Stream Commission for the State of New Mexico, a copy of which is annexed to this letter, I am handing said resolution to you.

“I was likewise advised by the Commission and its attorney that it is not the attitude of the Interstate Stream Commission to be contumacious concerning the court’s decree in this matter, but that the Interstate Stream Commission is convinced that in the decree so far as the State of New Mexico is concerned and its proprietary interests in the waters of the Gila that the court acted without jurisdiction, and that it is the purpose of the Interstate stream Commission, through the undersigned, to exercise its jurisdiction over the waters of the Gila.

“However, the Interstate Stream Commission and the undersigned believe that an amicable adjustment of the matter can be arranged if a meeting can be held with responsible officials of the two states and the United States representing the Indians and either a compact entered into between the states or some other satisfactory adjustment which will be fair and equitable.

“From the information and investigations made by this department, we have reached the conclusion that the water is not being equitably distributed and that citizens holding prior rights to waters of

the river in this State are being deprived of their rights.

“I wish to assure you in my own behalf and in behalf of the Commission that we would be happy to meet with responsible officials for a discussion of this matter at any time that suits the convenience of such officials.

“Respectfully,”

[Endorsed]: Filed Nov. 1, 1939. [591]

[Title of District Court and Cause.]

AMENDED RETURN TO ORDER TO
SHOW CAUSE

Come now Carl M. Donaldson, Byron Echols, B. J. Gale, G. Lynn Hatch, R. T. Johns, Willard E. Jones, John B. Jones, Parley P. Jones, T. V. Jones, M. N. Jensen, Mary Jane Jones, Rachel Jensen, Milton N. Jensen, Anna H. Lunt, P. L. Lunt, Hans Mortensen, Fenley F. Merrill, Orson A. Merrill, Leslie B. Payne, Nancy O. Pace, Junius E. Payne, H. M. Payne, J. E. Payne, (Trustee of the Church of Jesus Christ of Latter Day Saints), E. C. Payne, Ralph Richardson, Orson J. Richens, R. Richens, Henry L. Smith, Florence R. Swofford, Nancy A. Smith, School District No. 2, County of Hidalgo, State of New Mexico, E. Thygerson, B. Y. Whipple and Maude Larsen, in their own behalf only and make this their Amended Return to the Order to Show Cause heretofore issued in the above-entitled matter, and respectfully show to the Court:

1.

That they admit the allegations contained in paragraph 1 of the petition, except that they respectfully allege and show to the Court that the amended complaint in said cause, in response to which the decree in said cause was entered, and the decree itself discloses that said suit was an action by the plaintiff, the United States of America, to quiet the title of the United States to its claim in and to the waters of the Gila River in the States of Arizona and New Mexico, and purports to adjudicate the title to lands and waters appurtenant thereto [592] belonging to various defendants and situated in the State of Arizona and the State of New Mexico, and purports to bind their successors in interest.

(Paragraph 2 omitted because identical with same numbered paragraph in Brooks return.)

3.

Defendants admit that they owned and was in possession of certain lands under the Sunset Canal which were fully described and set forth in the decree of this court, as alleged in paragraph 3 of said petition, which said lands had been and were irrigated by the waters of the Gila River supplied through the Sunset Canal, and further answering said paragraph allege and say that there was never any corporation existing in the State of New Mexico known as the Sunset Canal Company, nor has Parley P. Jones, one of the answering defendants herein, ever been a director of the Sunset Canal

Company, and further answering said paragraph the defendants say that there has been incorporated under the laws of the State of New Mexico a corporation known as the Sunset Ditch Company, which said corporation forfeited its charter under the laws of the State of New Mexico and by an act of the legislature thereof prior to the date of the institution of this suit and which said corporation never had power under its charter to appropriate the waters of any river in New Mexico.

4.

These answering defendants deny each and every allegation contained in paragraph 4 of said petition.

Further answering said paragraph these answering defendants deny that any water was ever supplied to anyone by the Sunset Canal Company, or that there ever was a company known as the Sunset Canal Company in the State of New Mexico with power [593] to appropriate the waters of the said river or with any other powers, or that any such named company ever had any corporate existence in the State of New Mexico.

Further answering paragraph 4, on information and belief these answering defendants allege and show to the court that the following named defendants were either dead before the date of said decree and before the date of the filing of this action and before the date of their entry of appearance by counsel, or have died, sold their property or moved from the Virden District in Hidalgo County, New

Mexico, and did not use or attempt to use any of the waters of the Gila River during the year 1939;

M. M. Allred

J. E. Cardon

George H. Cospers, Jr. (Adm. of the Estate of
George Cospers, deceased)

W. F. Foster

R. H. Friestone

A. C. Gruwell

Edward Lunt

Hiram K. Mortensen

James A. Mitchell

W. J. Mabin

C. Pirtle

M. D. Patton

Mrs. T. M. Williamson

Peter Wahlin

S. A. Brown

C. M. Brooks

J. R. Beavers

Florentino Billaba

E. G. Davidson

M. B. Echols

Trivio Gonzales

F. W. Jones

Delbert Johnson

A. E. Keller

Owen Lunt

Peter Mortensen

O. Mortensen

Mitchell McDonald

R. J. McLaren

Helen A. Payne

Further answering the allegations of paragraph 4, of said petition these answering defendants admit that they owned certain lands as described in said decree at the time of the institution of said suit and allege that said lands were irrigated by the waters of the Gila River which were diverted or caused to be diverted by each respective defendant and conveyed to said lands through a canal known as the Sunset Ditch, which was maintained by the joint efforts of the various land owners using the same.

(Paragraphs 5, 6, 7, 8 omitted because identical with same numbered paragraphs in Brooks return.)

[594]

9.

In answer to paragraph 9, these answering defendants deny that there has ever existed a corporation known as the Sunset Canal Company described as such in the original decree, or that any canal company ever filed upon or had the right to divert water from the Gila River in New Mexico, and in this connection allege and say that the rights of the users of the waters of the Gila River in Hidalgo County, New Mexico, are individual rights filed and claimed by the owners thereof and allowed by the State Engineer of the State of New Mexico under and pursuant to the statutes of the State of New Mexico.

Further answering said paragraph 9, these answering defendants allege that the order mentioned therein made and entered on the 9th day of December, 1935, was void and of no effect as to land and water used by these defendants within the State of New Mexico for the reason that said land and water are and were outside of the territorial jurisdiction of this court.

(Paragraph 10 omitted because identical with same numbered paragraph in Brooks return.)

11.

Answering paragraph 11, these answering defendants allege that they are advised by counsel and believe, and therefore charge the fact to be that this court was without jurisdiction to enter said decree regulating the use of the waters of the Gila River and appointing a water master to administer the same outside the jurisdiction of said court and within the jurisdiction of the State of New Mexico, without the consent and against the will of the State of New Mexico.

These answering defendants deny that they have since the 3rd day of January, 1939, diverted or caused to be diverted any waters of the Gila River in violation of the orders of this court but allege that all water diverted from the Gila River for irrigating land in the State of New Mexico subsequent to January 3, 1939, was diverted by and under the direct control of the State of New Mexico by its duly authorized officers as [595] hereinafter more fully alleged.

Paragraphs 12, 13 and 14 A, B and C omitted because identical with same numbered paragraphs in Brooks return.)

14 D.

Further answering the allegations of said petition, defendants allege that Maude Larsen, E. Thygersen, J. E. Payne, (Trustee of the Church of Jesus Christ of Latter Day Saints), R. Richens, Nancy A. Smith and B. Y. Whipple, have not since January 1, 1939, owned any land or real estate in New Mexico irrigated by the waters of the Gila River, except town lots in the Village of Virden, Hidalgo County, New Mexico, a municipal corporation. That said defendants have not since January 1, 1939, diverted any waters of the Gila River; that the Village of Virden by and through its officers distributed all waters used for irrigation in the said Village of Virden and that the said water is turned on to the premises of said defendants by the said Village of Virden; that the only water used by said defendants is for the irrigation of small flower and vegetable gardens upon the said town lots.

E.

Further answering said petition, Defendants allege that H. M. Payne, N. O. Pace, E. C. Payne and Florence Swofford have not personally diverted any of the waters of the Gila River during the year 1939; that all of their lands have been either rented or managed by other persons; that the said Defendant, H. M. Payne, is eighty-two (82) years of age;

that Defendant N. O. Pace is eighty (80) years of age; that these defendants are too old to manage or cultivate real estate and that all lands owned by them in the Gila Valley have been at all times during the year 1939 rented to other persons; that Defendant Florence Swofford is of the approximate age of — years; that all lands owned by her in the Gila Valley have been [596] managed and cultivated by her children at all times during the year 1939; that Defendant E. C. Payne is a resident of Lordsburg, New Mexico, and has rented all lands owned by him in the Gila Valley and has not personally used the water of the Gila River during the year 1939; that said Defendants, nor any thereof, have not, either in person or by an agent, used, diverted or caused to be diverted any waters of the Gila River contrary to the said decree.

(Paragraph F is identical with paragraph D of Brooks return.)

Wherefore, these answering defendants respectfully pray to the Court that said petition be dismissed and that these defendants be discharged.

PARLEY P. JONES,

L. P. McHALFFEY,

Lordsburg, New Mexico.

H. VEARLE PAYNE,

Lordsburg, New Mexico.

A. T. HANNETT,

Albuquerque, New Mexico.

M. C. MECHEM,

Albuquerque, New Mexico. [597]

State of New Mexico,
County of Hidalgo—ss.

Parley P. Jones, being first duly sworn, upon his oath deposes and says:

That he is one of the defendants in the above-entitled action; that he has read the foregoing Amended Return to Order to Show Cause, knows the contents thereof and that the same is true of his own knowledge, except as to those matters alledged on information and belief, and as to those he believes them to be true.

PARLEY P. JONES

Subscribed and Sworn to Before Me, this the 1 day of November, A. D. 1939.

[Seal] P. M. JONES,

Notary Public.

My Commission Expires: July 8, 1943.

(Exhibits identical with exhibits in Brooks return)

[Endorsed]: Filed Nov. 6, 1939. [598]

[Title of District Court.]

November 1939 Term

At Tucson

MINUTE ENTRY OF WEDNESDAY,
FEBRUARY 6, 1940
(Globe Division)

Honorable Albert M. Sames, United States District
Judge, Presiding.

[Title of Cause.]

It Is Ordered that the motion to quash Rule to Show Cause and service thereof filed by Parley P. Jones, et al., on November 7, 1939, be denied;

It Is Further Ordered that motion to vacate final decree and orders made pursuant thereto filed by R. W. Brooks in these proceedings November 7, 1939, be denied;

The Court finds that each of the respondents to the Rule to Show Cause, namely, Carl M. Donaldson, Byron Echols, B. J. Gale, G. Lynn Hatch, R. T. Johns, Willard E. Jones, John B. Jones, Parley P. Jones, T. V. Jones, M. N. Jensen, Mary Jane Jones, Rachel Jensen, Milton N. Jensen, Anna H. Lunt, P. L. Lunt, Hans Mortensen, Fenley F. Merrill, Orson A. Merrill, Leslie B. Payne, Nancy O. Pace, Junius E. Payne, H. M. Payne, J. E. Payne (Trustee of the Church of Jesus Christ of Latter Day Saints), E. C. Payne, Ralph Richardson, Orsen J. Richens, R. Richens, Henry L. Smith, Florence R. Swofford, Nancy A. Smith, School District No. 2 County of Hidalgo State of New Mexico, E. Thygerson, B. Y. Whipple and Maude

Larsen; A. C. Gruwell, M. M. Allred, Edward Lunt, George H. Cosper; and R. W. Brooks is guilty of civil contempt as alleged in the Petition of the Water Commissioner filed herein on September 9, 1939, and It Is Ordered that C. A. Firth as Water Commissioner under the decree herein have and recover for his use and benefit as such Water [599] Commissioner in the administration of said decree, of and from each of said respondents severally the sum of one hundred dollars (\$100.00) counsel for said petitioner to prepare serve and file proposed findings of fact and conclusions of law and form of decree;

It Is Further Ordered that all counsel and respondents be and appear before this Court on the 11th day of March, 1940, at Tucson, Arizona, in the court room of this court at the hour of ten o'clock a.m. for the settlement of the findings of fact and conclusions of law and entry of judgment on said petition of the water commissioner and for such further orders as the Court may determine upon in the premises. [600]

[Title of District Court.]

November 1939 Term

At Tucson

MINUTED ENTRY OF FRIDAY

FEBRUARY 9, 1940

(Globe Division)

Honorable Albert M. Sames, United States District
Judge, Presiding.

[Title of Cause.]

On motion of M. C. Mechem, Esquire,

It Is Ordered that the respondents to the Rule to Show Cause in the contempt proceedings herein be allowed to February 25, 1940 within which to file proposed amendments or additions to the findings of fact and conclusions of law proposed by the petitioner herein. [601]

[Title of District Court.]

November 1939 Term

At Tucson

MINUTE ENTRY OF SATURDAY,

FEBRUARY 10, 1940

(Globe Division)

Honorable Albert M. Sames, United States District
Judge, Presiding.

[Title of Cause.]

On motion of John P. Dougherty, Esquire, Assistant United States Attorney,

It Is Ordered that the petitioners in the contempt proceedings herein be allowed to February 26,

1940 within which to file proposed findings of facts and conclusions of law and form of decree pursuant to the order of the Court entered herein February 6, 1940. [602]

[Title of District Court.]

November 1939 Term

At Tucson

MINUTE ENTRY OF SATURDAY,

FEBRUARY 17, 1940

(Globe Division)

Honorable Albert M. Sames, United States District
Judge, Presiding.

[Title of Cause.]

On motion of A. T. Hannett, Esquire,

It Is Ordered that the respondents to the Rule to Show Cause in the contempt proceedings be allowed ten days from the date of filing of plaintiff's proposed findings of facts and conclusions of law on the order entered herein February 6, 1940 within which to file objections thereto and proposed findings of facts and conclusions of law. [603]

[Title of District Court.]

November 1939 Term

At Tucson

MINUTE ENTRY OF MONDAY,
FEBRUARY 26, 1940
(Globe Division)

Honorable Albert M. Sames, United States District
Judge, Presiding.

[Title of Cause.]

Motion of A. T. Hannett, Esquire, that these proceedings be dismissed as to the respondent Hiram Pace having been submitted and by the Court taken under advisement, and the Court having duly considered the same and being fully advised in the premises,

It Is Ordered that said motion for dismissal as to said respondent be and it is denied. [604]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW REQUESTED BY RESPONDENTS

Now come the respondents in the above-entitled cause, by their attorneys, and respectfully move the court to make the following findings of fact and conclusions of law:

Requested Finding of Fact No. 1

That the Gila River is a perennial stream, having its head waters and originating in the State of New Mexico and meandering in a southwesterly direction through the County of Hidalgo, State of New Mexico, and crossing the state line between the States of New Mexico and Arizona into the State of Arizona, traversing a substantial portion of said state and becoming a tributary of the Colorado River.

Requested Finding of Fact No. 2

That all the lands and water rights owned by the respondents in these proceedings are situated in the County of Hidalgo, State of New Mexico, and outside the Territorial jurisdiction of the United States District Court for the District of Arizona, and that the respondents, and each of them, are citizens and residents of Hidalgo County, New Mexico.

Requested Finding of Fact No. 3

That the duty of water in Hidalgo County, New Mexico, on the Gila River is six acre feet per annum.

Requested Finding of Fact No. 4

That the following named respondents did not use any water from the Gila River in Hidalgo County, New Mexico, or else- [605] where from said

river in the year 1939, to-wit:

George H. Cospers

Nancy O. Pace

E. C. Payne

M. M. Allred

Mary Jane Jones

H. M. Payne

A. C. Gruwell

Edward Lunt

Requested Finding of Fact No. 5

That since the hearing in these proceedings, as more fully appears from a motion with a death certificate attached heretofore filed herein, Maude Larsen died.

Requested Finding of Fact No. 6

That the respondents Junius E. Payne and J. E. Payne are one and the same person, and likewise the respondents Milton N. Jensen and M. N. Jensen are one and the same person.

Requested Finding of Fact No. 7

That the following named respondents used water only on city lots in the municipality of the Town of Virden, the said lots having an area of 1.1 acres each, and that said water was delivered to them, and to each of them, by the municipality of the Town of Virden, which said Town was not a party to this cause, acting through a water master appointed by said municipality:

Anna H. Lunt

R. Richens

E. Thygerson

J. E. Payne, (Trustee of the Church of Jesus
Christ of Latter Day Saints)

Ralph Richardson

Nancy A. Smith

B. Y. Whipple

Requested Finding of Fact No. 8

That of the original seventy-five persons named in the rule to show cause in these proceedings and cited for contempt of court herein, the following named persons are either dead or have disposed of their property to third persons:

Hans Anderson

S. A. Brown

C. M. Brooks

J. R. Beavers

W. E. Bowers

Florentino Billaba

J. E. Cardon

Owen Lunt

R. H. Lunt

Maude Larsen

J. Alfred Mortensen

Hiram K. Mortensen

James A. Mitchell

Peter Mortensen [606]

E. G. Davidson

M. B. Echols

W. F. Foster
R. H. Friestone
Trivio Gonzales
H. Grady
M. L. Harris
F. W. Jones
Delbert Johnson
A. E. Keller
G. V. Lunt
Randall Lunt (Administrator of the Estate of
Jasper Gale, deceased)
O. Mortensen
W. J. Mabin
Mitchell McDonald
R. J. McLaren
C. Pirtle
G. Q. Payne
Helen A. Payne
M. D. Patton
E. W. Richens
Mrs. T. M. Williamson
Peter Wahline

and that the total number of acres with water rights appurtenant thereto as disclosed by the original decree herein owned by said last named persons were approximately 1118.7 acres.

Requested Finding of Fact No. 9

That the total number of acres served by the Sunset Canal and involved in these proceedings is 2433.7.

Requested Finding of Fact No. 10

That the respondent Hiram Pace was not a party to the original suit herein.

Requested Finding of Fact No. 11

That no demand was made on any of these respondents for the payment of the thirteen cents per acre, except a demand made on the Sunset Canal Company, which was non-existent.

Requested Finding of Fact No. 12

That none of the respondents broke any locks or opened any headgates, or in any way interfered by any personal act of theirs with the administration of the waters of the Gila River or with the duties imposed upon the petitioner, Firth, by the terms of said decree, as charged in the petition.

Requested Finding of Fact No. 13

That none of the respondents diverted water from the Gila River in the year 1939, but on the contrary said water was diverted, administered and distributed [607] under the direction of the State Engineer of the State of New Mexico after he had created a water district of the area of land owned by these respondents and others named in the original suit, and said waters were so diverted and administered by a water master appointed by the State Engineer of the State of New Mexico acting under and pursuant to the authority vested in him by the laws of the State of New Mexico.

Requested Finding of Fact No. 14

That the acts of the State Engineer of the State of New Mexico, C. B. Tooley and John Bradford, Jr., alleged and complained of in the petition herein, whereby they took possession of the Sunset Canal in the State of New Mexico and diverted and distributed the waters of the Gila River to these respondents and ousted the said C. A. Firth from control of the same, were all done and performed under the direction of the Governor of the State of New Mexico at the instance of the Interstate Stream Commission of the State of New Mexico and in their official capacities, and were not done and performed for and on behalf of, or as agents or representatives of, the respondents herein named.

Requested Finding of Fact No. 15

That approximately one-half of the land under the Sunset Canal or ditch is now owned by persons not parties to the original decree or orders issued supplementary thereto.

Requested Finding of Fact No. 16

That the following named respondents in the original suit were dead, either before the original suit herein was instituted or before the entry of the decree in the original suit herein, and before the order of December 9, 1935, issued supplementary to the making of said decree: [608]

Florentino Billaba, died in 1931

E. G. Davidson, died in 1928

Trivio Gonzales, died in 1933

F. W. Jones, died in March, 1926

Owen Lunt, died in January, 1934

Mitchell McDonald, died in 1933

C. Pirtle, died in 1927

Requested Finding of Fact No. 17

That the Sunset Ditch Company never did business in the State of Arizona.

Requested Finding of Fact No. 18

That the Sunset Ditch Company was incorporated in the year 1903 under the laws of the Territory of New Mexico, and that on the 14th day of June, 1921, the charter of said corporation was forfeited pursuant to a mandatory statute by action of the State Corporation Commission of the State of New Mexico.

Requested Finding of Fact No. 19

That the Sunset Canal is the only means of diversion and the only canal diverting waters from the Gila River to serve and serving the lands of these respondents and other defendants named in the rule and order to show cause.

Requested Finding of Fact No. 20

That the Sunset Ditch Company or the Sunset Canal Company never owned any land on the Gila

River in Hidalgo County, New Mexico, or appropriated any waters for use on lands nor applied water to beneficial use or any lands in New Mexico.

Requested Finding of Fact No. 21

That when the water was turned off from the Sunset canal by the petitioner in October, 1938, and again in January, 1939, it turned off the water from all the users of said ditch including a large number of persons not parties to the original decree in this cause.

Requested Finding of Fact No. 22

That C. A. Firth did not make demand upon any of the respondents for acreage assessments to which he claims to be [609] entitled, under and by virtue of the orders and decree of this court, except upon Parley P. Jones, R. W. Brooks and Rachael Jensen, and such demand was made upon them in their alleged official capacity as a committee or directors of the Sunset Canal.

Requested Finding of Fact No. 23

That the petitioner, C. A. Firth, performed no services as water commissioner to administer water for the Sunset Canal and these respondents during the year 1939.

Requested Finding of Fact No. 24

That no damage to the plaintiff was alleged in the original suit in this cause nor found to be existent.

Requested Finding of Fact No. 25

That no damage to the plaintiff, United States, or its wards, was alleged to have occurred by any act on the part of these respondents, or the defendants in New Mexico named in the amended complaint, nor was any damage determined to have occurred to the plaintiff or its wards by the terms of the original decree herein. [610]

CONCLUSIONS OF LAW

Requested Conclusion of Law No. 1

That it appears from the amended complaint and the original decree in this cause that this suit is an action to quiet title to water rights in New Mexico.

Requested Conclusion of Law No. 2

That this suit is a naked action to quiet title and null and void as to lands and water rights appurtenant thereto in the State of New Mexico.

Requested Conclusion of Law No. 3

That the original decree in this cause was a consent decree and in accordance with an agreement between the parties, the court merely exercising an administrative function in recording what had been agreed to between the parties, and upon one of the parties seeking to enforce such decree it is the duty of the court to inquire into the equities and determine whether or not its enforcement would be equitable.

Requested Conclusion of Law No. 4

That the original decree being a consent decree is not *res adjudicata*.

Requested Conclusion of Law No. 5

That this court was without jurisdiction to appoint a water commissioner to administer the waters of the Gila River in the State of New Mexico, and that the appointment of said commissioner was an invasion of the sovereign powers and rights of the State of New Mexico.

Requested Conclusion of Law No. 6

That this court was without jurisdiction to enforce the performance in New Mexico of the acts required to be performed by its said decree and the orders supplementary thereto.

Requested Conclusion of Law No. 7

That under the laws and Constitution of the State of New Mexico, water is appurtenant to the lands and becomes real [611] estate upon the compliance with the statutes of the State of New Mexico for the initiation and perfection of water rights.

Requested Conclusion of Law No. 8

That under the laws and the Constitution of the State of New Mexico and under the statutes of the United States, the State of New Mexico as a sovereign state has such title, ownership or interest in

the waters of the Gila River and such interest in preserving the taxable value of the lands of its people dependent for such value upon irrigation waters from the Gila River, and the interests of the State of New Mexico are so indissolubly linked with the rights of defendant appropriators of water that it was an indispensable party in this cause without whose presence complete justice and a final determination of this said cause could not be had.

Requested Conclusion of Law No. 9

That the Governor of the State of New Mexico, the Interstate Stream Commission of the State of New Mexico, and the State Engineer of the State of New Mexico were cloaked and vested with the sovereign powers of the State of New Mexico relative to the control, management and distribution of the waters of the Gila River within the State of New Mexico in the Virden District, and elsewhere on the Gila River in said state, and that the said State Engineer had lawful power and authority to oust the defendant, C. A. Firth, from jurisdiction over the waters of said river and to administer the same for the benefit of the State of New Mexico and its water users holding lawful water rights on the said Gila River which rights were and are exercised under the laws and Constitution of the State of New Mexico for the beneficial use of said [612] waters upon lands located in said State of New Mexico.

Requested Conclusion of Law No. 10

That the respondents were without power or legal right by assignment, conveyances, or the consent decree herein to alienate or part with title to or the right to use the waters of the Gila River secured to them by virtue of their compliance with the laws of the State of New Mexico, in that by complying with the laws of the State of New Mexico they acquired only the usufruct of the waters of said stream, the basic title and the right to control and dispose of said waters remaining at all times in the State of New Mexico.

Requested Conclusion of Law No. 11

That the water rights involved herein are owned and possessed by the individual respondents. That the Sunset Ditch, through which the water is carried, is a common carrier and that the water right is not attached to the ditch but is appurtenant to the lands irrigated and that said water rights are owned by the parties in severalty.

Requested Conclusion of Law No. 12

That the Sunset Ditch Company had no right under the laws of New Mexico to divert water in that it was not the owner of water nor an appropriator thereof.

Requested Conclusion of Law No. 13

That the service of process on respondents, Hiram Pace, Parley P. Jones, R. W. Brooks and

Rachael Jensen, as alleged directors of the Sunset Canal Company was made upon them outside the territorial jurisdiction of this court in the State of New Mexico and such service is void, and the court did not thereby acquire jurisdiction over them.

Requested Conclusion of Law No. 14

That upon the failure of the Sunset Ditch Company to file its annual reports and pay annual fees and upon the action of the State Corporation Commission of New Mexico in forfeiting [613] the charter of the Sunset Ditch Company by virtue of a mandatory statute of New Mexico, the Sunset Ditch Company became civilly dead, and no officer, director or attorney had any power or authority to enter an appearance for it and any judgment rendered against it or any appearance made in its behalf in any court, including the purported entry of appearance in this cause, was void and a nullity, and any judgment or decree in this cause against the Sunset Ditch Company was void on its face and a nullity.

Requested Conclusion of Law No. 15

That the decree in this cause is a nullity as to the successors in title of the original defendants, respondents herein, who have died or sold their property since the date of said decree, and further that said decree is a nullity so far as it tends to operate directly on the lands and water rights in New Mexico.

Requested Conclusion of Law No. 16

The original decree is a nullity so far as it requires the doing of a positive act affecting the water rights and lands in New Mexico by the water commissioner, C. A. Firth.

Requested Conclusion of Law No. 17

That it does not appear from the complaint in this cause that the defendants had invaded the water rights of the United States, *it* wards, the Indians, described therein, or any water user in Arizona, or had committed any trespass upon said rights or committed any wrong against any right asserted by the plaintiff in this cause or its wards, or any water user in the State of Arizona, nor does it appear from the records in this cause that the plaintiff, or its wards, or any other person in Arizona suffered any damage by reason of any act theretofore committed by any person in New Mexico, including these respondents.

[Endorsed]: Filed Feb 26 1940. [614]

[Title of District Court.]

November 1939 Term

At Tucson

MINUTE ENTRY OF MONDAY,

MARCH 11, 1940

(Globe Division)

Honorable Albert M. Sames, United States District
Judge, Presiding

[Title of Cause.]

This case comes on regularly this day for settlement of findings of facts and conclusions of law and entry of decree pursuant to the order of February 6, 1940.

Frank E. Flynn, Esquire, United States Attorney, and H. S. McCluskey, Esquire, special counsel, appear for the Government. Charles H. Reed, Esquire, appears as counsel for the San Carlos Irrigation District. John C. Gung'l, Esquire, appears as counsel for the Gila Water Commissioner and Geraint Humphries, Esquire, Special Field Counsel, Indian Field Service, is present. M. C. Mechem, Esquire, A. T. Hannett, Esquire, L. P. McHalfey, Esquire, and H. Vearle Payne, Esquire, appear as counsel for the respondents.

On motion of the said United States Attorney,

It Is Ordered that default herein be entered as to the respondent Hiram Pace.

On motion of the said United States Attorney,

It Is Ordered that default herein be entered as to the respondent Sunset Canal Company.

A. T. Hannett, Esquire, now suggests the death of H. M. Payne.

The said United States Attorney now requests that Maude Larsen and H. M. Payne be eliminated from any judgment now entered herein for the reason that said respondents are now deceased.

The said United States Attorney now presents pages [615] 1 and 1a for substitution for page 1 of petitioner's proposed findings of facts heretofore filed herein, and

It Is Ordered that said petitioner be allowed to substitute pages 1 and 1a now presented for page 1 of petitioner's proposed findings of facts heretofore filed herein.

Petitioner's proposed findings of facts and conclusions of law and respondents proposed findings of facts and conclusions of law are now duly argued by respective counsel.

It Is Ordered that the contempt proceedings herein be dismissed as to the respondents Edward Lunt, A. C. Gruwell, M. M. Allred, and George H. Cosper.

On motion of the said United States Attorney,

It Is Ordered that the contempt proceedings herein be dismissed as to the respondent Hiram Pace.

The respondents now renew motion to quash rule to show cause and service thereof and motion to dismiss as to the respondents R. W. Brooks, Parley P. Jones and Rachel Jensen as directors of the Sunset Canal Company,

It Is Ordered that each of said motions be and it is denied.

It Is Ordered that Frank E. Flynn, Esquire, United States Attorney, be allowed to withdraw from the file herein plaintiff's proposed findings of fact and conclusions of law and form of judgment for correction thereof.

The said United States Attorney now presents reengrossed form of findings of fact and conclusions of law and judgment, and It Is Ordered that the same be approved and spread upon the minutes and entered herein as follows: [616]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

That on the 6th, 7th and 9th days of November, 1939 the above-entitled matter came on for hearing before the Court on the petition of C. A. Firth, the Court's Water Commissioner in the above-entitled cause, and on motion of F. E. Flynn, United States Attorney for the District of Arizona, and a rule against the hereinafter named respondents, to show cause why they, and each of them, should not be punished for contempt of Court for violating the terms of the decree entered in the above-entitled cause on the 29th day of June, 1935, and the orders of the Court made in pursuance thereto; and the Court having considered the same and the returns

to said rule; and heard the evidence introduced on behalf of the petitioner and the respondents; and being fully advised in the premises, both as to the law and the facts; and having been requested by the respondents to make written findings and conclusions, does hereby make the following findings of facts and conclusions of law:

FINDINGS OF FACT

I.

The above-entitled cause, numbered E-59-Globe, was instituted in this Court by the United States of America, as plaintiff, for itself and as trustee and guardian of the Pima and Apache Indians, to determine their respective rights [617] to the use of the waters of the Gila River, an interstate stream, to irrigate large areas of lands in the Gila River and San Carlos Indian reservations, respectively, in the State of Arizona; that the Gila Valley Irrigation District and others, residents of the State of Arizona, were made defendants in said action, and that the following named respondents, residents of Hidalgo County, State of New Mexico, to-wit:

Sunset Canal Company; R. W. Brooks, Carl M. Donaldson; Byron Echols; B. J. Gale; G. Lynn Hatch; R. T. Johns; Willard E. Jones; John B. Jones; T. V. Jones; Parley P. Jones; Mary Jane Jones; Rachael Jensen; Milton N. Jensen; Maude Larson; Anna H. Lunt; Hans Mortensen; Fenley F. Merrill; Orsen A. Merrill; Leslie B. Payne;

Nancy O. Pace; Junius E. Payne; H. M. Payne; J. E. Payne, Trustee of Church of Jesus Christ of Latter Day Saints; E. C. Payne; Ralph Richardson; Orsen J. Richens; R. Richens; Henry L. Smith; Florence R. Swofford; Nancy A. Smith; School District No. 2, County of Hidalgo, State of New Mexico; E. Thygerson; B. Y. Whipple; M. M. Allred and P. L. Lunt, were defendants in said cause; that they appeared and filed their respective answers and cross-complaints therein and signed a stipulation for judgment and decree; that said respondents were defendants in said cause at the time of the entry of the decree herein.

II.

That the Sunset Ditch Company was, in 1903, duly incorporated under the laws of the State of New Mexico; that thereafter said corporation took possession of and thereafter managed and operated the Sunset Canal; that at the time the Court acquired jurisdiction in this cause, said corporation was doing business under the name of "Sunset Canal Company" [618] in the states of Arizona and New Mexico, and ever since has been, and now is, doing business under said name; that during all of said time, the officers, agents and representatives of said corporation have acted for said corporation by using the name "Sunset Canal Company", and still continue so to do; that the Sunset Canal Company is identical with the corporation organized and incorporated in 1903, under the laws

of the State of New Mexico under the name of Sunset Ditch Company, and is referred to as a party-defendant herein under both names.

III and IV.

That Parley P. Jones, R. W. Brooks, Rachael Jensen and Hiram Pace were officers and directors of the Sunset Canal Company during the year 1939.

V.

That the above respondents named in paragraph I of these findings, with the exception of the Sunset Canal Company, during all of the year 1939, owned or were in possession of certain lands located in Hidalgo County, State of New Mexico, which lands and the respective owners thereof are more fully described in the decree heretofore duly entered herein; that said lands were, during the year 1939, and for a long time prior thereto, irrigated with water diverted from the Gila River in the State of New Mexico, by the respondent, the Sunset Canal Company, and carried by it to said lands through the canal generally and commonly known as the "Sunset Canal".

VI.

That the Court, having jurisdiction in said suit, received and approved a stipulation of the parties thereto, and entered a final decree in conformity with said stipulation [619] and equity; that all of the respondents, whose names are set forth in

paragraphs I and II hereof, were parties to said stipulation and decree; that said final decree contained an injunction against all parties to said suit and their successors and assigns.

VII.

That in said stipulation the Court was requested to appoint, and the decree provided for the appointment of a Water Commissioner to carry out and enforce the provisions of the decree, and the instructions and orders of the Court, and if any proper orders, rules or directions of such Water Commissioner, made in accordance with and for the enforcement of the decree, were disobeyed or disregarded, the Water Commissioner was empowered and authorized to cut off the water from the ditch then being used by the person so disobeying such proper orders, rules or directions.

VIII.

That thereafter the Court appointed C. A. Firth as Water Commissioner and, on December 9, 1935, the Court made and duly entered an order, which said order reads as follows:

“This cause came on regularly for hearing this 9th day of December, 1935, on order of the Court duly made heretofore for determining the manner and method of providing compensation for the Water Commissioner heretofore appointed by the Court in the above entitled cause, providing for and authorizing the Water

Commissioner to secure assistants, clerical help, office and field equipment. The Court received from the Water Commissioner, C. A. Firth, an estimate of the costs of administering the Gila River decree for the calendar year 1936, a copy of which is attached hereto. The Court having heard counsel for all the principal landowners and the United States Attorney, representing the plaintiff, and being fully advised in the premises,

It Is, Therefore, Ordered that the Water Commissioner establish an office at Safford, Arizona, and he is hereby authorized to employ an assistant for the Duncan and Virden Valley at an annual salary not to exceed \$1500. He is also authorized to employ an assistant for the Safford Valley at an annual salary not to exceed \$1800. He is also authorized to employ an office engineer at an annual salary not to exceed \$2400. The Commissioner [620] is authorized to employ clerical help at approximately \$1800 per year.

The Water Commissioner shall be allowed for his travel expenses and all personal expenses incurred by him as such Water Commissioner the sum of \$1800 per year. He is also authorized to pay to his assistant in the Duncan Valley \$1200 per year as a travel allowance and he is authorized to pay a like allowance to his assistant in the Safford Valley. The Water Commissioner is further authorized to make

expenditures specified and indicated in item 3 of his estimate attached hereto.

It Is Further Ordered that all expenses of the Water Commissioner herein authorized shall be paid by the land owners and for that purpose the Water Commissioner is authorized and directed to collect 13¢ for each acre of land for which a water right is given in the decree. The Water Commissioner is further directed to collect said 13¢ per acre from each *individual*, corporation, or party designated in the decree as the party entitled to divert water from the Gila River under the terms thereof and in each instance where the parties entitled to divert are represented by an irrigation district which is a party to this suit such irrigation district shall be responsible for collecting the said 13¢ per acre and paying it over to the Water Commissioner. The collection of said 13¢ per acre for the lands represented by the United States, whether Indian or non-Indian, shall be collected by the United States of America, the plaintiff herein.

It Is Further Ordered That all parties, save and except the United States of America, shall pay their share of the Commissioner's expenses in advance, in two equal installments, the first of which shall be made on February 1, 1936, and a second installment of a like amount on the 1st day of July, 1936. Thereafter, semi-annual payments of equal amounts shall be made

on the 1st day of January and the 1st day of July, unless otherwise specified by an order of this Court.

It Is Further Ordered that the expenses of the Water Commissioner payable by the plaintiff, the United States of America, shall be paid by the proper United States Government disbursing officer of the Indian Irrigation Service in 12 equal monthly payments, beginning February 1, 1936, which said payments and which said sums shall all be paid in accordance with Government regulations.

The Water Commissioner Is Ordered and Directed to refuse the delivery of water from the Gila River to any party entitled to divert so long as such diverter remains in default in the payment of any of its share of the said 13¢ per acre.

The Commissioner Is Further Ordered and Directed to have each party entitled to divert water from the Gila River install at his or its own expense, adequate and substantial headgates with adequate locking facilities and accurate measuring and automatic recording devices on or before March 1, 1936. He shall advise such diverter as promptly as possible the size, type and proper location of such headgates and measuring and automatic recording devices as he shall deem proper and when any such party shall notify the Commissioner that he or it is ready to make installation

thereof the Commissioner shall supervise such installation to the end that accuracy and economy shall be facilitated.

The Commissioner Is Further Directed to prepare and file with the Court, with copies to the interested parties, a full and complete report, certified under oath, showing the daily quantity of water distributed to the respective users and the conditions under which such water was diverted and used, including diversion rates during the period of his administration of the decree up to and including the 31st day of December, 1936, and annually thereafter unless otherwise directed by the Court. Said report shall contain an analysis of his expenditures during said period, also a tabulation and an analysis of all hydrometric data collected relating to the River during said period.

Done in open Court this 9th day of December, 1935.

ALBERT M. SAMES

Judge, United States District
Court, for the District of
Arizona."

IX.

That C. A. Firth qualified, and ever since the 1st day of January, 1936, he has been and now is, the Court's Commissioner, duly authorized and empowered to enforce and carry out the provisions of said decree and order; that thereafter, in accord-

ance with paragraph eight of the aforesaid order, he directed and requested that all parties to said decree, entitled by its provisions to divert water, to install proper headgates, adequate locking facilities, accurate measuring and automatic recording devices; that he so advised and directed the respondent Sunset Canal Company; that from time to time the Water Commissioner issued orders, rules and directions concerning the use of water, in conformity with the provisions of said decree and order.

X.

That respondent Sunset Canal Company duly installed adequate headgates, adequate locking facilities, and accurate measuring and automatic recording devices, and that it [622] and the other respondents above named operated under and in conformity with the decree and the orders, rules and directions of the Water Commissioner from January 1, 1936, to and including December 31, 1938.

XI.

That, in accordance with said order, the Water Commissioner duly notified each party entitled to divert water from the Gila River, including respondent Sunset Canal Company, to pay 13¢ per acre for all lands for which it was entitled to divert; that the Sunset Canal Company collected said sum from all the water users under its system, including each of the respondents herein, and paid

said sum to the Water Commissioner for the years 1936, 1937 and 1938.

XII.

That after the entry of the decree, as found in paragraph VI hereof, the parties to said suit, including the respondents, continued to operate, or cause to be operated, the lands respectively owned or possessed by them; that said respondents since the entry of said decree have continued to irrigate, or cause to be irrigated, their respective lands with water diverted from the Gila River by respondent Sunset Canal Company, and carried to their said lands through the said Sunset Canal; that from January 1, 1936, to and including December 31, 1938, said respondents operated, or caused to be operated, said lands, and irrigated, or caused the same to be irrigated, under and according to the terms and provisions of said decree and the orders of this Court, and abided by and complied with the terms and provisions of said decree and orders of this Court, and the orders, rules and directions duly issued thereunder by the said Water Commissioner.

[623]

XIII.

That since the entry of said decree, as aforesaid, the respondent Sunset Canal Company operated the said Sunset Canal and diverted water from the Gila River, in the State of New Mexico, and carried said water through said canal to the lands owned or operated by the respondents; that from

January 1, 1936, up to and including December 31, 1938, said Sunset Canal Company operated said canal and diverted water from said Gila River, in the State of New Mexico, and carried same to the lands as aforesaid and to lands in the State of Arizona, in compliance with the terms and provisions of the decree herein, the orders of this Court and the orders, rules and directions of the Water Commissioner; that said Sunset Canal Company, in the operation of said canal, abided by and complied with all of the terms and provisions of said decree, the orders of this Court and the orders, rules and directions of said Water Commissioner.

XIV.

That on or about January 1, 1939, demand was duly made on the respondent Sunset Canal Company for the payment of the water assessment levied upon the lands owned or operated by the respondents named in paragraphs I and IV hereof of these findings, for the first half of the year 1939; that said respondent Sunset Canal Company refused to pay the same, or any part thereof, and still continues to fail and refuse so to do; that thereupon, C. A. Firth, said Water Commissioner, closed and locked the diverting structures and measuring devices on the said canal and thereupon directed respondent Sunset Canal Company not to divert any water from the Gila River into the said Sunset Canal for use upon the lands owned or operated by the respondents herein. [624]

XV.

(A) That on or about January 4, 1939, said respondents hereinbefore named, and each of them, wilfully and unlawfully broke, or caused to be broken, the locks on said diverting structures and measuring devices and caused other locks to be placed thereon;

(B) That the respondent Sunset Canal Company, and its officers and agents, at all times since the 4th day of January, 1939, have failed and refused to provide adequate locking facilities, or accurate measuring or automatic recording devices, for the use of the Water Commissioner, as provided for in the order of this Court; that said respondent has refused to deliver to the Water Commissioner keys to such locks that were placed on the head-gates and recording *guages* owned by said Sunset Canal Company, and has denied said Water Commissioner access thereto; and that said respondent has refused and failed, and still continues to refuse and fail, to furnish the Water Commissioner information as to the amount of water diverted from the Gila River, by said respondent and delivered to the lands under its system during the calendar year 1939;

(C) That said respondents, and each of them, during the year 1939, denied the right of the Water Commissioner to regulate or control the diversion or distribution of the waters of the Gila River into the Sunset Canal in the State of New Mexico; that during the year 1939, the respondent, Sunset Canal

Company, without paying therefor as provided by the decree and order of this Court, wilfully and wrongfully diverted water from the Gila River in the State of New Mexico, and carried the same through the Sunset Canal to the lands of respondents owning or operating lands in the State of New Mexico, and that such respondents wilfully and wrongfully used said water in irrigating the respective lands owned or operated by them. [625]

XVI.

That the Water Commissioner, petitioner herein, has been damaged and prejudiced by the acts and conduct of the respondents, as aforesaid, and has incurred extra-ordinary expenses for legal and other assistance in an effort to carry out the decree and orders of the Court; that he has been, and now is, unable to furnish the Court, or the parties to said decree, an accurate and full report of the use of the water from the Gila River for the year 1939.

From the foregoing findings of fact, the Court makes the following conclusions of law:

CONCLUSIONS OF LAW

1. That this Court had jurisdiction in the premises to make and enter its decree dated June 29, 1935, and its order of December 9, 1935, and all other orders and directions issued pursuant to said decree, and that the Court has jurisdiction of the respondents herein;

2. That said decree and the orders made pursuant thereto were, when made, ever since have

been, and now are, valid, subsisting and binding upon the parties thereto, their grantees, assigns or successors in interest;

3. That at the time of the entry of the decree herein, on the 29th day of June, 1935, the Sunset Canal Company was, ever since has been, and now is, a corporation doing business in the states of Arizona and New Mexico and within the jurisdiction of this Court;

4. That by their acts and conduct, the respondents, Sunset Canal Company; R. W. Brooks; Carl M. Donaldson; Byron Echols; B. J. Gale; G. Lynn Hatch; R. T. Johns; Willard E. Jones, John B. Jones; T. V. Jones; Parley P. Jones; Mary Jane Jones; Rachael Jensen; Milton N. Jensen; Maude Larson; Anna H. Lunt; Hans Mortensen; Fenley F. Merrill; Orsen A. Merrill; Leslie B. Payne; Nancy O. Pace; Junius E. Payne; J. E. Payne, Trustee of Church of Jesus Christ of Latter Day Saints; E. C. Payne; Ralph Richardson; Orsen J. Richens; R. Richens; Henry [626] L. Smith; Florence R. Swofford; Nancy A. Smith; School District No. 2, County of Hidalgo, State of New Mexico; E. Thygersen; B. Y. Whipple; P. L. Lunt have violated the terms of said decree and orders of Court made pursuant thereto; that they have held in contempt the decree and the injunction therein contained, the orders and officer of this Court and that judgment should be entered herein finding and adjudging said respondents, and each of them, guilty of contempt.

Dated at Tucson, Arizona, March 11th, 1940.

ALBERT M. SAMES,

Judge, United States District
Court for the District of
Arizona. [627]

DEPARTMENT OF JUSTICE

United States Attorney
District of Arizona

Phoenix, Arizona.

February 21, 1940.

I, Ruth Harris, hereby certify that under date of February 17, 1940, I caused to be sent through the United States mails, an envelope addressed to Messrs. Mechem and Hannett, Attorneys at Law, First National Bank Bldg., Albuquerque, New Mexico, and an envelope addressed to Mr. H. Vearle Payne, Attorney at Law, Lordsburg, New Mexico, each containing a copy of the within Findings of Fact and Conclusions of Law, in the case of United States of America, Plaintiff, v. Gila Valley Irrigation District, et al., No. E-59-Globe, in the District Court of the United States for the District of Arizona.

RUTH M. HARRIS

[Endorsed]: Proposed Findings. Filed Feb. 23, 1940.

[Endorsed]: Findings & Conclusions. Filed Mar. 11, 1940. [628]

In the District Court of the United States
for the District of Arizona

No. E-59-Globe

UNITED STATES OF AMERICA,
Plaintiff,

vs.

GILA VALLEY IRRIGATION DISTRICT, et al.,
Defendants.

JUDGMENT

In the matter of the petition of C. A. Firth, the Court's Water Commissioner in the above entitled cause, and the motion of F. E. Flynn, United States Attorney for the District of Arizona, and a rule against the hereinafter named respondents to show cause why they, and each of them, should not be punished for contempt of Court for violating the terms of the decree entered in the above entitled cause on the 29th day of June, 1935, and the orders of the Court made in pursuance thereto, the Court, having considered the above entitled matter and the returns to said rule, and heretofore having heard the evidence submitted by the respective parties hereto, and being fully advised in the premises, both as to the law and the facts, and having been requested to, has made and filed its findings of fact and conclusions of law;

Now, Therefore, It Is Hereby Ordered and Adjudged that Sunset Canal Company; R. W. Brooks;

Carl M. Donaldson; Byron Echols; B. J. Gale; G. Lynn Hatch; R. T. Johns; Willard E. Jones; John B. Jones; T. V. Jones; Parley P. Jones; Mary Jane Jones; Rachael Jensen; Milton N. Jensen; Anna H. Lunt; Hans Mortensen; Fenley F. Merrill; Orsen A. Merrill; Leslie B. Payne; Nancy O. Pace; Junius E. Payne; J. E. Payne, Trustee of Church of Jesus Christ of Latter Day Saints; [629] E. C. Payne; Ralph Richardson; Orsen J. Richens; R. Richens; Henry L. Smith; Florence R. Swoford; Nancy A. Smith; School District No. 2, County of Hidalgo, State of New Mexico; E. Thygerson; B. Y. Whipple and P. L. Lunt, and each of them, be, and hereby are, held in contempt of this Court, for which contempt they, and each of them, are hereby fined and assessed in the sum of \$100.00.

It Is Further Ordered and Adjudged that the aforesaid sum of \$100.00 be paid by each of said respondents forthwith to the Clerk of this Court, for the use of said Water Commissioner, C. A. Firth, to be used by him to pay the extraordinary expenses incurred by him in the preparation for and prosecution of respondents in these proceedings; and for such other expenses as the Water Commissioner now has, or may, incur in the administration of said decree.

Done in open Court this eleventh day of March, 1940.

ALBERT M. SAMES

Judge, United States District
Court for the District of
Arizona.

RH

Approved as to form: this 11th day of March, 1940.

H. VEARLE PAYNE

M. C. MECHEM

Attorneys for respondents ex-
cept Sunset Canal Company
and School District No. 2,
County of Hidalgo, State of
New Mexico.

[Endorsed]: Judgment. Filed Mar 11 1940. [630]

[Title of District Court.]

November 1939 Term At Tucson

MINUTE ENTRY OF MONDAY,

MARCH 11, 1940

(Globe Division)

Honorable Albert M. Sames, United States District
Judge, Presiding.

[Title of Cause.]

It is ordered that the supersedeas bond on appeal from the judgment on contempt entered herein this date be fixed in a sum equal to the total amount of

the judgments entered herein on contempt against the parties who might appeal therefrom and in addition the sum of \$500.00 for costs. [631]

[Title of District Court.]

October 1939 Term At Phoenix

MINUTE ENTRY OF FRIDAY, MARCH 29, 1940
(Globe Division)

Honorable Albert M. Sames, United States District
Judge, Presiding.

[Title of Cause.]

The respondents, R. W. Brooks, et al, having presented to the Court for approval their superseas and cost bond on appeal executed on the 26th day of March, 1940, in the sum of \$3,600.00 with the National Surety Corporation of New York as surety thereon.

It is ordered that said bond be and the same is accepted and approved. [632]

In the District Court of the United States
for the District of Arizona

No. E-59 Globe

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GILA VALLEY IRRIGATION DISTRICT,
et al.,

Defendants.

C. A. FIRTH,

Petitioner.

NOTICE OF APPEAL TO THE CIRCUIT
COURT OF APPEALS FOR THE NINTH
CIRCUIT

Notice is hereby given that R. W. Brooks, Carl M. Donaldson, Byron Echols, B. J. Gale, G. Lynn Hatch, Rachel Jensen, Milton N. Jensen, R. T. Johns, Willard E. Jones, John B. Jones, Parley P. Jones, T. V. Jones, P. L. Lunt, Fenley F. Merrill, Orson A. Merrill, Hans Mortensen, Leslie B. Payne, Orsen J. Richens, Henry L. Smith, Florence R. Swofford, Mary Jane Jones, Anna H. Lunt, Nancy O. Pace, Junius E. Payne, J. E. Payne, Trustee of the Church of Jesus Christ of Latter Day Saints; E. C. Payne, Ralph Richardson, R. Richens, Nancy A. Smith, E. Thygerson, B. Y. Whipple, respondents in the above-entitled cause, hereby appeal to

the Circuit Court of Appeals for the Ninth Circuit from the judgment of contempt and fine thereon, heretofore entered in the above cause.

H. VEARLE PAYNE,

Lordsburg, N. M.

L. P. McHALFFREY,

Lordsburg, N. M.

M. C. MECHEM,

Albuquerque, N. M.

A. T. HANNETT,

Albuquerque, N. M.

Attorneys for Appellants. [633]

[Endorsed]: Filed Apr 9 1940. [634]

[Title of District Court and Cause.]

STATEMENT OF POINTS TO BE RELIED
UPON BY RESPONDENTS, TOGETHER
WITH DESIGNATION OF PARTS OF
RECORD.

Pursuant to Rules of Civil Procedure for the District Courts of the United States, respondents make the following statement of points upon which they intend to rely in the appeal, together with designation of the parts of the record necessary for the consideration thereof:

Point I

It appears from the amended complaint and the original decree in this cause that this suit is a naked action to quiet title and null and void on its

face as to lands and water rights appurtenant thereto in the State of New Mexico.

Point II

It does not appear from the complaint in this cause that the defendants had invaded the water rights of the United States, its wards, the Indians, described therein, or any water user in Arizona, or had committed any trespass [635] upon said rights or committed any wrong against any right asserted by the plaintiff in this cause or its wards, or any water user in the State of Arizona, nor does it appear from the records in this cause that the plaintiff, or its wards, or any other person in Arizona suffered any damage by reason of any act theretofore committed by any person in New Mexico, including these appellants.

Point III

That the original decree in this cause was a consent decree and in accordance with an agreement between the parties, the court merely exercising an administrative function in recording what had been agreed to between the parties, and upon one of the parties seeking to enforce such decree it is the duty of the court to inquire into the equities and determine whether or not its enforcement would be equitable; and further, that the original decree, being a consent decree, is not *res judicata*.

Point IV

That the court was without jurisdiction to appoint a water commissioner to administer the wat-

ers of the Gila River in the State of New Mexico, and that the appointment of said commissioner was an invasion of the sovereign powers and rights of the State of New Mexico.

Point V

The court was without jurisdiction to enforce the performance of positive acts by its water commissioner required to be performed by its said decree and orders supplementary thereto affecting water rights and controlling the distribution of water in the State of New Mexico. [636]

Point VI

That under the laws and Constitution of the State of New Mexico water is appurtenant to the lands and becomes real estate upon the compliance with the statutes of the State of New Mexico for the initiation and perfection of water rights.

Point VII

That under the laws and the Constitution of the State of New Mexico and under the statutes of the United States, the State of New Mexico as a sovereign state has such title, ownership or interest in the waters of the Gila River and such interest in preserving the taxable value of the lands of its people dependent for such value upon irrigation waters from the Gila River, and the interests of the State of New Mexico are so indissolubly linked with the rights of defendant appropriators of water that it was an indispensable party in this cause without

whose presence complete justice and a final determination of this said cause could not be had.

Point VIII

That the Governor of the State of New Mexico, the Interstate Stream Commission of the State of New Mexico, and the State Engineer of the State of New Mexico were cloaked and vested with the sovereign powers of the State of New Mexico relative to the control, management and distribution of the waters of the Gila River within the State of New Mexico in the Virden District, and elsewhere on the Gila River in said state, and that the said State Engineer had lawful power and authority to oust the defendant, C. A. Firth, from jurisdiction over the waters of said river and to administer the same for the benefit of the State of New Mexico and its water users holding lawful water rights on the said Gila River, [637] which rights were and are exercised under the laws and Constitution of the State of New Mexico for the beneficial use of said waters upon lands located in said State of New Mexico.

Point IX

That the respondents were without power or legal right by assignment, conveyances, or the consent decree herein to alienate or part with title to or the right to use the waters of the Gila River secured to them by virtue of their compliance with the laws of the State of New Mexico, in that by complying with the laws of the State of New Mexico they acquired

only the usufruct of the waters of said stream, the basic title and the right to control and dispose of said waters remaining at all times in the State of New Mexico.

Point X

That the water rights involved herein are owned and possessed by the individual respondents. That the Sunset Ditch, through which the water is carried, is a common carrier and that the water right is not attached to the ditch but is appurtenant to the lands irrigated and that said water rights are owned by the parties in severalty.

Point XI

That the Sunset Ditch Company had no right under the laws of New Mexico to divert water in that it was not the owner of water nor an appropriator thereof.

Point XII

That the service of process on respondents, Hiram Pace, Parley P. Jones, R. W. Brooks and Rachael Jensen, as alleged directors of the Sunset Canal Company was made upon them [638] outside the territorial jurisdiction of the court in the State of New Mexico and such service is void, and the court did not thereby acquire jurisdiction over them.

Point XIII

That upon the failure of the Sunset Ditch Company to file its annual reports and pay annual fees and upon the action of the State Corporation Com-

mission of New Mexico in forfeiting the charter of the Sunset Ditch Company by virtue of a mandatory statute of New Mexico, the Sunset Ditch Company became civilly dead, and no officer, director or attorney had any power or authority to enter an appearance for it and any judgment rendered against it or any appearance made in its behalf in any court, including the purported entry of appearance in this cause, was void and a nullity, and any judgment or decree in this cause against the Sunset Ditch Company was void on its face and a nullity.

Point XIV

That the decree in this cause is a nullity as to the successors in title of the original defendants, respondents herein, who have died or sold their property since the date of said decree, and further that said decree is a nullity so far as it tends to operate directly on the lands and water rights in New Mexico.

Point XV

The court erred in refusing to permit the respondents to introduce proof that by reason of the acts of the Water Commissioner, C. A. Firth, appointed in this cause, in his control and regulation of the diversion of waters of the Gila River into the Sunset Canal during the year 1938 and [639] thereby depriving them of the use of said water, that they and other water right owners under said ditch not parties to this cause suffered great loss and damage.

Point XVI

The court erred in refusing to permit the respondents to introduce proof that during the year 1938 they were, by the water commissioner, C. A. Firth, deprived of water flowing in the Gila River at the headgate of the Sunset Ditch which would have saved their crops and prevented them from suffering damage, and that said water which was denied them but was permitted to flow down the bed of the Gila River was lost and was of no benefit to the water users on the Gila River in the State of Arizona.

Point XVII

The court erred in refusing to permit the respondents to introduce proof that in the year 1939 the water diverted by the State Engineer of the State of New Mexico to the respondents and other water right owners under the Sunset Ditch, and which was placed to beneficial use by them, would not and could not have reached the dam of the plaintiff at Coolidge, Arizona, and that it would not have and could not have benefited any water users in the State of Arizona, and further that according to the terms of the decree, had they been enforced and interpreted by C. A. Firth, the water commissioner appointed by the court, and as operated by him in previous years, and had not the State Engineer of the State of New Mexico taken charge of and administered the waters of the Gila River to these respondents in the year 1939, all vegetation, including alfalfa, fruit trees and annual crops of

the respondents and other persons not parties to said [640] cause but owners of land and water rights under said Sunset Ditch would have been destroyed.

Point XVIII

The court erred in refusing to permit said respondents to introduce evidence to prove that the water of the Gila River alleged to have been diverted and used by them in violation of the decree and orders made pursuant thereto would not have benefited plaintiff and Arizona water users if it had not been so diverted and used, and that without said diversion and use the respondents and other water users under the Sunset Ditch would have lost their crops and would have suffered great loss and damage.

Point XIX

The court erred in refusing to permit the plaintiff to introduce proof that the State Engineer of the State of New Mexico is the custodian of the public records showing the existence of all rights to appropriate waters in the State of New Mexico which are valid and subsisting, including those of all water users in the Virden Irrigation District, Hidalgo County, New Mexico, being the lands and water rights described in the decree on file herein, and that all of said water rights and appropriations in the State of New Mexico were made by and are now owned and held by individuals, and no corporation is the owner or holder of any said water rights or the right to divert water from the said Gila

River, as shown by the records in the State Engineer's office of the State of New Mexico.

Point XX

The court erred in refusing to permit the respondents [641] to introduce evidence to prove that numerous defendants, owners of lands and water rights described in the decree, who were shown by the record to have appeared in this cause and to have consented to the entry of the decree, were dead at the time they are shown to have appeared or at the time they are shown to have consented to said decree.

Point XXI

The Court erred in refusing to permit the respondents to introduce evidence to prove

A. That more than fifty per cent of the area of the land and water rights in New Mexico described in the decree herein as owned by defendants named in said decree is now owned and irrigated by third persons who were not parties to said decree.

B. That there is but one canal, to-wit, the Sunset Canal, serving respondents and the said persons who are not parties to this proceeding owning lands and water rights under said canal and from which they are entitled to receive water for the irrigation of their said lands, and that the water master appointed in this cause cannot regulate the diversion and distribution of water under said decree to the respondents according to their rights under said decree without depriving the water right owners

who were not parties to said decree of their rights to water granted them by their New Mexico appropriations.

Point XXII

The court erred in denying the motion of Hiram Pace, respondent, to dismiss the petition herein and quash the rule to show cause and quash the service of said rule upon him. [642]

Point XXIII

The court erred in denying the motion of Parley P. Jones, Hiram Pace, R. W. Brooks and Rachael Jensen, to dismiss the petition herein, quash the rule to show cause which had been issued herein, and quash the service of said rule upon them as directors of the Sunset Canal Company.

Point XXIV

The court erred in overruling the motion of all of the respondents to vacate the final decree made and entered herein on June 29, 1935, and all orders pursuant thereto so far as said decree and orders purport to determine the priority of said water rights and to regulate and control the diversion of said waters of the Gila River and the use and enjoyment thereof by these defendants in the State of New Mexico.

Point XXV

The court erred in overruling the motion of the respondents to vacate said decree because it does not appear from the amended complaint or from

said decree that at the time this suit was brought the United States in its own behalf or in behalf of anyone else was in the present use and enjoyment of the waters, title to which is sought to be quieted.

Point XXVI

The court erred in denying the motion of the respondents that the court require the plaintiff to assume the burden of establishing the equity and fairness of the consent decree.

Point XXVII

The court erred in ruling that the burden of proof was upon the respondents to prove that they were not guilty of [643] the charges of contempt made against them.

Point XXVIII

The evidence before the court does not show that the respondents, or any of them, failed or refused to obey, or disobeyed any order, injunction or decree of the court.

Point XXIX

The evidence fails to show that the respondents, Mary Jane Jones and Nancy O. Pace, used water from the Gila River in the year 1939.

Point XXX

The fine imposed of \$100.00 each on the respondents is for a round sum of money not based upon any proved item or items of expense, but intended to cover probable losses and expense and that if

imposed by way of indemnity to the petitioner it should not exceed his actual loss incurred by the violation of the injunction, including the expense of the proceedings necessitated in presenting the offense for the judgment of the court, and is not based upon evidence showing the amount of loss and expense, and the sum of \$100.00 is necessarily arbitrary, arrived at by conjecture, and that the said fine is punitive and not remedial.

Point XXXI

If failure to pay the thirteen cents per acre constitutes contempt, the only relief the trial court could have granted the petitioner was to imprison the respondents until they had paid said thirteen cents per acre. [644]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

The parts of the record necessary for the consideration of the points relied upon are as follows:

1. Stipulation, dated April 9th, 1940.
2. Include all of petition of Charles A. Firth, and exhibits referred to therein, in the matter of the proceedings against Sunset Canal Company et al.
3. Include all of the motion for rule to show cause, in the matter of the proceedings for contempt, omitting the names of all defendants except "Hans Anderson" and adding the words "et al."
4. Include all of the order granting motion for

contempt, omitting the names of all defendants except "Hans Anderson" and adding the words "et al."

5. Include all rules to show cause in the contempt proceedings, omitting the names of all defendants except "Hans Anderson" and adding the words "et al."

6. Include all of the amended return of R. W. Brooks to order to show cause.

7. Include all of the amended return of Carl M. Donaldson et al., respondents, except the following: omit paragraphs 2, 5, 6, 7, 8, 10, 12, 13, 14 A, B and C, and inserting in lieu thereof "paragraphs omitted because identical with same numbered paragraphs in Brooks return"; omit paragraph F and insert "identical with paragraph D of Brooks return"; omit all exhibits and insert "exhibits identical with exhibits in Brooks return."

8. Include minute orders showing dates of filing original complaint, amended complaint, acceptance of service by respondents, and answer to amended complaint filed by Franklin Irrigation District et al., filed January 8, 1929.

9. Include all minute entries pertaining to these [645] proceedings subsequent to February 5, 1940, except the minute entries as to the swearing of witnesses.

10. Include findings of fact and conclusions of law.

11. Include respondents' proposed findings of fact and conclusions of law.

12. Include judgment.

13. The following parts of the amended complaint:

(a) Include caption;

(b) Include first four lines of page 1, down to and including the words "Gila Valley Irrigation District" and adding the words "et al.", and omit the balance of page 1, pages 2, 3, 4, 5 and the first three lines on page 6;

(c) Include beginning with "Virden Irrigation District", line 4, to and including "D. Y. Whipple", at the end of line 26, page 6;

(d) Omit balance of pages 6, 7, 8, 9, 10 and the first seven lines on page 11, ending with "Elsie De Wolf Zellweger", and insert, as per stipulation of the parties, the following:

"The complaint in paragraph I, in addition to the foregoing, named as defendants some 40 canal or ditch companies and irrigation districts and approximately 1500 defendants, comprising municipal corporations, school districts, corporations and persons, residents of Arizona and New Mexico, who are not Indians or wards of the United States or represented by the United States."

Include lines 8 and 9, on page 11.

(e) Include paragraphs 2 and 3 in full;

(f) The following parts of paragraph 4:

1. Include sub-paragraph a;

2. Omit sub-paragraph (b);

3. Omit all of sub-paragraph (c) except:

“That certain others of said defendants, to-wit: * * * Sunset Canal Company, Sunset Irrigation Canal Company * * * are corporations doing business in Greenlee County in said District of Arizona”;

4. Omit sub-paragraphs (d) and (e);

5. Include sub-paragraph (f);

6. Omit remainder of paragraph 4 down to and including the word “Arizona”, in line 2, page 17;

(g) Include paragraphs 5, 6, 7, 8, 9, 10 and 11 in full, and paragraph 12 down to and including the fourth line on page 25, omitting the tables on pages 25, 26 and 27, and the first three lines on page 28, and insert, beginning with “Total 27,000 acres”, on page 26, and all the remainder of paragraph 12, on page 28;

(h) Include paragraphs 13, 14 and 15 in full;

(i) Include the prayer in full.

14. Include that part of admissions of service of amended complaint dated December 5, 1927, beginning with line 4, page 7, to the end thereof on page 9.

15. The following parts of “Answer to Amended Bill of Complaint” of Franklin Irrigation District et al, filed January 8, 1929;

(a) Omit caption;

(b) Include on page 1 the words “Come now”, and omit balance of pages 1, 2, 3, 4, and the first five lines on page 5;

(c) Beginning with "Group V", line 7, page 5, include sub-paragraphs 1 and 2, omit sub-paragraphs 3 and 4, include sub-paragraph 5, omit sub-paragraph 6;

(d) Include, beginning with the words "And [647] answering", line 15, page 6, to and including paragraphs I, II and the first section of paragraph III, ending with the words "General of plaintiff", line 4, page 7;

(e) Include paragraph IV, beginning with line 16, page 7, down to and including the word "Hidalgo", line 4, page 8, and omit beginning with line 5, on page 8, down to and including line 17, page 31; include paragraph XV, beginning with line 18 to and including line 29, page 31; omit all thereafter down to and including the words "and irrigated thereby", line 22, page 134;

(f) Include all of sub-paragraph 5 of paragraph XX, beginning with line 23, page 134, to-wit, "5. As to defendant Sunset Ditch Company", down to sub-paragraph 6, on page 146, line 27, omitting therefrom the tables or schedules beginning on line 26, page 141, to and including the words "Total acres 4.5," line 25, page 145; omit all thereafter down to and including line 17, page 168;

(g) Include the prayer in full, beginning on line 19, page 168, to the end.

16. Include condensed statement of Reporter's transcript of testimony and proceedings, before

Honorable Albert M. Sames, Judge, taken at Tucson, Arizona, on November 6, 7 and 9, 1939, filed April 9th, 1940.

17. Include the U. S. Marshal of New Mexico's Return of service of order to show cause upon Parley P. Jones, et al, directors and officers of Sunset Canal Company.

18. Include condensed statement of Reporter's transcript of testimony and proceedings, before Honorable Albert M. Sames, Judge, taken at Tucson, Arizona, on the 11th day of March, 1940, filed April 9th, 1940.

19. Include decree as per stipulation.

20. Include copies of reports of Courts Water [648] Commissioner, as per stipulation.

21. Include Petitioners Exhibit "A" in evidence.

22. Include the Notice of Appeal with date of filing.

23. Include Order fixing Amount of Supersedeas Bond.

24. Note the filing of supersedeas bond, but do not set out bond in full.

25. Include this statement of points to be relied upon by appellants, together with designation of parts of record.

26. Include the designation by appellee of parts of record to be included.

A. T. HANNETT

M. C. MECHEM

Attorneys for Appellants

Received copy this 9th day of April, 1940.

H. S. McCLUSKEY

JOHN C. GUNG'L

H. S. M.

Attorneys for Appellees

[Endorsed]: Filed Apr. 9, 1940. [649]

[Title of District Court and Cause.]

CONDENSED STATEMENT OF REPORTER'S
TRANSCRIPT OF TESTIMONY AND PRO-
CEEDINGS BEFORE HONORABLE AL-
BERT M. SAMES, JUDGE, TUCSON, ARI-
ZONA, NOVEMBER 6, 7, AND 9, 1940
(RULE 75-b)

The Court: Are you ready, gentlemen?

Mr. Flynn: The Government is ready, your Honor.

Gov. Hannett: The defendants are ready.

Gov. Hannett: Now, at this time, if the Court please, we have a further proposition that we desire to submit to the Court, on a question of law that we think is of primary importance. If the Court please, the record in this case shows definitely that this decree is a consent decree; there can be no question about that, and I think counsel will concede that that is true. The language of the decree itself is very plain in that respect. We desire to call the Court's attention to the following line of

authorities, (presenting authorities and argument).

And so, if the Court please, we now say that the United States of America, having sought the aid of this Court to enforce the decree, which is in the nature of a contract and which is a consent decree, are now confronted with showing that this decree is applicable [650] and this proposition is brought to your Honor's attention at this time for the purpose of determining who shall go forward with this controversy at this time, it being our position, which we respectfully submit to your Honor, that the burden of going forward is with the United States District Attorney.

Mr. Flynn: The assumption of counsel that this decree is an equitable one and the burden is upon us to prove it, even assuming that the rest of his argument is correct and his law is sound, of course, is not well founded, because this decree is a decree of this Court and certainly carries the presumption of being equitable at this time and, if in fact it is not equitable, that burden should be upon the respondents in this case. We do not consent that they even have that right to go back of the decree, but even admitting part of counsel's argument, we contend that the burden is upon them to establish their defense. There is a petition here, a verified affidavit, stating facts constituting a contempt of this Court, and the question of whether or not a person can be guilty of contempt of a consent decree until it is established by further proceedings that this is equitable, I don't believe there is any foundation

in law for that position. In fact, a consent decree is really more solemn and more binding upon all parties than a decree entered without their consent, and so we contend that the burden is upon the respondents to purge themselves of the allegations in the petition and supported by the verified affidavit, which, insofar as I am able to determine, with the exception of some of the defendants who have moved away and did not use water in 1939, and died, the burden is upon them at this time. [651] Particularly upon the ones who have appeared here. The pleadings themselves, I think, are sufficient to place the burden upon the respondents in this case to purge themselves of the contempt which is apparent from the pleadings.

The Court: Yes, I think the nature of the proceedings is such on the verified affidavits that have been filed here that it is incumbent upon the respondents here to show cause to purge themselves, if they can, and you may proceed.

Gov. Hannett: We would like the record to show, and of course it does, that the verified petition was met by the verified answer, and we take exception to the ruling of the Court. That being true, I assume it is now incumbent upon us to offer our evidence.

The Court: That is the position of the Court.

(Gertrude E. Mason was then sworn as reporter for the hearing.)

Gov. Hannett: At this time we ask that the Clerk produce the depositions on file here, and that we may read the depositions that were taken.

(The Clerk then produced the depositions.)

Gov. Hannett: May I open them?

The Court: Yes.

Gov. Hannett: These are the depositions of Hon. John E. Miles, Governor of New Mexico, Hon. Thomas M. McClure, State Highway Engineer for New Mexico, Mr. John R. Bradford, Junior, State Policeman for New Mexico, Mr. Washington Hugh Pace and Mr. Cosme R. Garcia.

The Clerk: It will be marked Respondent's Number One for identification. For my record, this is for the case for all the respondents? [652]

Gov. Hannett: Yes.

Gov. Hannett: If your Honor please, that concludes the deposition. Now, may we call Mr. Bliss?

JOHN H. BLISS,

Called as a witness on behalf of the respondents, being first duly sworn, was examined and testified as follows:

Direct Examination:

By Gov. Hannett:

Q. You may state your name.

A. John H. Bliss.

Q. Where do you reside, Mr. Bliss?

A. Santa Fe, New Mexico.

(Testimony of John H. Bliss.)

Q. Do you hold any official position with the State of [653] New Mexico? A. I do.

Q. You may state that position.

A. I am an engineer in the State Engineer's office, and at present my work is—I am working as an engineer on Interstate Stream work, with the Interstate Stream Commission, part time.

Q. How long have you been in charge of investigation of Interstate rivers for the State of New Mexico?

A. I have been connected with the Interstate Stream Commission ever since it was formed in 1935. I think the month of August of 1935.

Q. Are you a graduate in engineering?

A. Yes, I graduated from Colorado Agricultural College in 1925.

Q. In Engineering?

A. In civil and irrigation engineering, yes, sir.

Q. How many years of practical experience have you had? A. Fourteen.

Q. Have you made any study of the Gila River and Virden Valley of New Mexico?

A. Yes, I have.

The Court: If I understand, counsel wanted to show that any water that came into the Sunset Canal, that conditions and situations were such that that water never reached Coolidge Reservoir and storage dam?

Gov. Hannett: That the water during the growing months, in the growing season of 1938 and 1939,

(Testimony of John H. Bliss.)

that water could have been utilized by the farmers in the Virden Valley and put to beneficial use, in 1938 was denied them and went down the river and was of no use to anybody and disappeared in the sand; that in 1939 the [654] water that was there, when the sovereign power of New Mexico took charge, all of that water, from then up to the present time, if it had been permitted to go down the stream, would have disappeared in the sand and would have been lost forever.

The Court: Does counsel urge that that situation would justify the defendants in not complying with the provisions of the decree?

Gov. Hannett: It would justify the State of New Mexico in going in and exercising its sovereign power. Their officials are charged here with being the agents of these defendants in so going in and exercising that power.

The Court: And the officials of the State of New Mexico are not respondents?

Gov. Hannett: No, your Honor, but this whole case is based on the proposition that they are the agents of these respondents.

Mr. Flynn: That is not so. That is a conclusion of counsel and we disagree with him. There is nothing in the complaint to that effect.

Gov. Hannett: I will see what the complaint says, (reading from complaint to the point ending, "were acting in behalf of the State of New Mexico, who, as your petitioner is informed and believes,

(Testimony of John H. Bliss.)

that all of said acts were performed as agents and representatives of the parties herein complained of." That seems to me very plain, "as the agents of the parties herein complained of".

(After argument)

The Court: Well, the question is back now on the point as to whether it is admissible, that the water flow, if it had not been appropriated, would never reach [655] Coolidge Dam.

Gov. Hannett: That is true, and I would like to read to the Court what Justice Cardozo says, (reading case, following by argument).

The Court: Well, as the Court has indicated, it doesn't see where that water, if it ever reached Coolidge Dam, would ever make any difference as to the appropriation of it under the conditions and in violation of the decree. Well, the objection will be sustained.

Gov. Hannett: At this time, your Honor, we offer to prove that—We take exception to the Court's ruling and we offer to prove at this time by this witness and by the records of the U.S.G.S. and its gauging stations that the year of 1939 was a particularly and unusually dry year, that in the year of 1939 the water diverted by the State Engineer of the State of New Mexico to the Virden Valley farmers, the respondents in this case in the State of New Mexico, which was placed to beneficial use by them, would not and could not have reached

(Testimony of John H. Bliss.)

the dam of the plaintiff at Coolidge; that it would not and could not have benefitted any water users across the State line in the State of Arizona; and further, that by the terms of the decree, had the decree been enforced as interpreted by Mr. Firth, the Water Master and as operated by him in years gone by, and had not the State Engineer of the State of New Mexico taken charge of and administered the waters of the Virden Valley to these defendants, that all vegetation, including alfalfa and fruit trees and all agriculture in this valley would have been destroyed; and further, that we have further witnesses to corroborate and substantiate the testimony of this witness. [656]

The Court: Well, as has been indicated, that might have justified the appropriation by the Virden Valley users of the water and saved it to their use before it reached the canal provided that it was done under the decree, but I don't believe that the justification — as the Court indicated — for taking water as they did is sufficient excuse for not complying with the terms of the decree.

Gov. Hannett: There is no proof that they did, and it is not asserted that they did, your Honor, but that the officers of the State of New Mexico did, as agents for these defendants, and the testimony of the officers of the State of New Mexico is before the Court.

The Court: Well, the Court has made its ruling, and you have saved your exception. Have you com-

(Testimony of John H. Bliss.)

pleted the tender of the proof that you wanted to offer?

Gov. Hannett: Yes, your Honor.

The Court: Very well.

Gov. Hannett: Mr. Bliss, will you take the chair over there a minute? (The witness complied). Now, if the Court please, perhaps we can save time by making a tender. I propose and offer to show further by this witness that taking the lands only of the people who are now before the Court in this proceedings here, and in response to this order, only the people who are here respondents, taking their land alone and their water alone, that it would be physically impossible to administer the waters of the Sunset canal to the users of decreed rights only; that is to say, the record shows and we offer to prove that more than substantially half of these defendants are either dead or have sold or leased and did not use water in 1939, and that it would be physically [657] impossible for water from this one canal to be administered to the people who are here, bound by this decree, and leave out the people who have died or sold and who are innocent third purchasers.

The Court: Well, that matter was presented, I think, during the testimony yesterday, or referred to, the matter you are alluding to now?

Gov. Hannett: Yes, your Honor.

The Court: And you want now to proffer such testimony through this witness?

(Testimony of John H. Bliss.)

Mr. Flynn: We object, of course, your Honor, on the ground that it is immaterial and no defense, and does not tend to prove any defense.

Gov. Hannett: In order to make the record perfectly clear, we now offer to prove by this and other witnesses that over half of the lands in the Virden Valley which were originally under the decree of this Court in this case has passed into the hands of innocent third purchasers and to people who are not now and never have been parties or privy to this decree, and that such lands are all served by one canal, that is to say, the lands under the decree and owned by people here present and the lands no longer under the decree or subject to the jurisdiction of this Court, and that when Mr. Firth shut off the headgate in October of 1938, and posted his notices on the 3rd of January, 1939, that no water would be delivered until it had been paid for, that he shut off not only the water of the people under this decree but of necessity, by reason of the physical facts, he shut off water from people owning substantially half of the land, who are not under this decree or bound by it, directly or indirectly, who are innocent third purchasers, and who had a right to [658] the waters under the laws and the statutes of the State of New Mexico and the laws of the United States.

The Court: And the parties you are referring to are parties claiming rights under the Sunset Ditch or Sunset Canal?

(Testimony of John H. Bliss.)

Gov. Hannett: There is no Sunset Ditch or canal, your Honor——

The Court: Well, what is so-called.

Gov. Hannett: The rights are claimed only by the individuals. The Court will readily perceive, from the articles of incorporation introduced here, that it was the Sunset Ditch Company, and that corporation never had any existence at the time this suit was instituted, and further, by the articles herein evidence, it was simply a common carrier and never had any right to appropriate water and never has appropriated water. There are two defendants in here, the Sunset Ditch and the Sunset canal, and the Sunset canal never existed; the Sunset Ditch Company is dead, and the Sunset Ditch Company never had the authority to appropriate water, never attempted to and never did appropriate water.

The Court: Well, your tender is completed, Governor Hannett, the testimony you propose to offer?

Gov. Hannett: Yes, your Honor.

The Court: The ruling will be adhered to.

Gov. Hannett: Exception?

The Court: Yes.

Gov. Hannett: That is all, Mr. Bliss.

(Witness excused)

Gov. Hannett: We also offer to prove by Mr. Firth, the Court's Water Commissioner, the physi-

cal facts just offered to be proved by this witness. [659]

The Court: Of course, the same ruling of the Court would apply to the same testimony or approximately the same testimony.

Gov. Hannett: I think perhaps we can agree as to the way the record should be made up, and I will dictate this for the purpose of the record, and if we [660] don't agree, of course, we can wait for Mr. Smith to come and present his testimony.

These respondents offer to show by the testimony of Mr. Smith, the Assistant State Engineer, who has joint custody of the records of the State Engineer's office of the State of New Mexico, wherein all water rights, that is to say, the right to appropriate waters of the public streams of New Mexico, including the Gila Valley or the Gila River, and the right to divert waters from the said stream are filed, and that there is no corporation in New Mexico, domestic or foreign, or any corporation who has ever appropriated or attempted to appropriate or filed any papers of any class or character indicating a desire to appropriate waters from the Gila River in Hidalgo County, New Mexico, with the State Engineer's office at Santa Fe; and further, that it appears affirmatively from the records of the State Engineer's office at Santa Fe that the rights of these respondents in this proceedings were, the water rights, the right to appropriate was acquired directly from the State by filings in the

office of the State Engineer; that the only rights or claims to rights to use water from the Gila River in the Virden district in Hidalgo County, New Mexico, appearing of record are in the names of the individual water users who are named defendants in the original decree and such others who have thereafter made application for water rights.

The Court: That is the purport of the testimony that will be probably proffered on the appearance of the witness to whom you have alluded?

Gov. Hannett: That is correct, your Honor.

The Court: Well, I think the objection is [661] good and I shall so hold.

Mr. Flynn: May the record show that the objection stated prior to the statement by Governor Hannett is sustained?

Gov. Hannett: I think the objection ought to be stated here, so we may know clearly what it is.

The Court: What is it you want?

Gov. Hannett: If your Honor please, I would like to have Mr. Flynn, the representative of the United States, make his objection now.

The Court: I thought he made his objection.

Gov. Hannett: I would like to have it repeated now, because he made some statement about there being no proper foundation, and I would like to know if it is included in this objection, so then we will have to wait for Mr. Smith to come.

Mr. Flynn: We object to the offer, and if the testimony were offered by the witness in Court we would object to it upon the same grounds, that is,

upon the ground that the evidence, the testimony, is immaterial as to the issues in this case and does not tend to disprove the charge or to prove the innocence of the respondents to the offense charged, and for the further reason that it is about a matter which is incorporated in the original pleadings in this case and merged in the decree which was entered upon those pleadings and the stipulation, and therefore it would not be admissible for that reason as well as being immaterial; for the further reason, also, that it is to a large extent conclusions and would necessarily be a conclusion of the witness.

Gov. Hannett: Before the Court rules on that, would you please read my offer? [662]

(The reporter then read the offer of counsel.)

The Court: The nature of the ruling you want at this time is as to whether that testimony would be received?

Gov. Hannett: Yes, your Honor.

The Court: The Court has already indicated what the ruling would be, and I state now that if the objection, if the witness was here, was urged against that testimony, the Court would sustain the objection.

Gov. Hannett: Exception, please.

The Court: Allowed.

MR. WASHINGTON HUGH PACE,

being first duly sworn, was called as a witness on behalf of respondent, and, being examined by A. T. Hannett, testified as follows:

My name is Washington Hugh Pace. I have lived in the Virden Valley nearly all my life. My people came there when I was two years old. I was gone for approximately six years from 1925 to 1931. I know all the people. I am the same person Mr. McClure testified to as being the water master.

The following respondents did not use any water during the year 1939:

M. M. Allred

George H. Cospers, Jr.

A. C. Cruwell

Mary Jane Jones

Edward Lunt

Nancy O. Pace

H. M. Payne

E. C. Payne

The respondent E. C. Payne had his land leased and the lessee used water thereon during the year 1939. [663]

The following respondents used water distributed to them by the Town Ditch Boss of the Town of Virden, which is an incorporated village under the laws of New Mexico:

Anna H. Lunt

Ralph Richardson

R. Richens

(Testimony of Washington Hugh Pace.)

Nancy A. Smith

E. Thygerson

B. Y. Whipple

School District No. 2, Hidalgo County

The following named respondents used water from the Sunset Ditch for the year 1939:

R. W. Brooks

Carl M. Donaldson

Byron Echols

B. J. Gale

G. Lynn Hatch

Rachel Jensen

Milton N. Jensen

R. T. Johns

Willard E. Jones

John B. Jones

T. V. Jones

Parley P. Jones

P. L. Lunt

Fenley F. Merrill

Orson A. Merrill

Hans Mortensen

Leslie B. Payne

J. E. Payne

Orsen J. Richens

Henry L. Smith

Florence R. Swofford

(Testimony of Washington Hugh Pace.)

J. E. Payne, Trustee for
the Church of Jesus
Christ of Latter Day
Saints

That all of said water was diverted from the Gila River and delivered from the Sunset Canal.

Nancy O. Pace is an invalid, eighty years of age, the owner of land and water rights under the Sunset Ditch, but did not use water. She had leased her land to H. M. Pace who did use water.

Mary Jane Jones did not use water. She lives around with her children, and owns a town lot in Virden. Water was delivered to her lot in town during the summer of 1939.

The Town of Virden has a ditch boss and the water is turned over to him from the canal and he carried it to the sidewalk of the lot owners and turns it into their lots and issues it out that way. Those lots are 1.1 acres in area. [664]

I came to Santa Fe with a committee and appeared before the Interstate Stream Commission on November 22, 1938. On the committee were Robert Mortensen and myself who owned water rights under the Sunset Canal, but we are not parties to this suit.

As water master I estimated the amount of water available for eight days and gave the water ditch rider the figure as to how long he could run this water per acre. The basis for the amount of water

(Testimony of Washington Hugh Pace.)

delivered was the amount of water in the river available. There were under the ditch approximately 2,456 acres of filed water rights. In addition to giving water for the 2400 acres filed, I gave water to the lower end of the Sunset in Arizona for 318 acres, and I delivered water to the Arizona users every time I delivered water to the people in New Mexico under the Sunset Canal. I released water to the Arizona people on request of some official in Arizona. I remember when the Sunset Ditch was closed in the month of October, 1938, and I had a discussion with Mr. Firth about the Sunset Ditch being closed. It was on October 10, 1938. There were present, Parley Jones, Mr. Firth and myself. Jones and myself tried to get Mr. Firth to let us have a few hours to finish up. He closed the gates and locked them and I said, "Firth, who is going to get the benefit," and he said, "Not a soul." I meant that the water would be lost in the river bed and would not reach the Arizona users.

Cross Examination

By Mr. Flynn:

When I made the statement that approximately half the land owners are not under the decree, I meant that half the present owners were not parties to the [665] litigation. I do not know whether that is true of the land owners when the decree was entered. I am basing it on present land owners and I took the original ones and figured who had sold

(Testimony of Washington Hugh Pace.)

or died. I do not know anything about the decree except the names of the parties. There are 2,450 acres under the decree. That is what Mr. Firth issued water to.

I started as water master on the 22d day of February, 1939. I received requests from the Sunset Canal Company. The officials were Parley Jones and J. R. Robbe. The individuals who requested water to be turned in who claimed to be acting as officials for the Canal Company were Parley P. Jones under the Sunset and J. R. Robbe. Robbe claimed to represent the Sunset Canal Company. At his request I turned water into the Sunset Ditch. No other individual requested it. I was not connected with any company or canal myself. I made estimates of the amount of apportionment without advice or suggestion of any canal company or owners and took it upon myself to determine how much water they could use and when to use it to properly irrigate their land. I had no complaint from any New Mexico user or company of the amount of water they were getting. At no time has any land owner in New Mexico requested me to permit the water commissioner appointed by the Federal Court to administer the water and take care of it. The water turned into the canals by me was used by New Mexico land owners and users. They never made any objection to my administering or distributing the water.

(Testimony of Washington Hugh Pace.)

Redirect Examination

By Mr. Hannett:

I administered the water under direction of Mr. Firth for the years 1937 and 1938 and was employed [666] by the Sunset Ditch Company. I followed Mr. Firth's orders in the distribution of water. Acting under Mr. McClure I followed the same method and also kept up with the land owners the same as before.

I mean by saying that I kept up with the land owners, I visited the lands not as was done—as I did in 1937 and 1938, but I was right along with the water as it went on the lands in 1939. I measured and helped the ditch rider and took the same amount of water when there was sufficient.

During the time Mr. Firth was administering the water I was paid by the Sunset Canal Company, and the same situation continued under Mr. McClure. They had a ditch rider. I was not employed or compensated by the Sunset Ditch. They had a separate man as ditch rider who helped me.

Recross Examination

By Mr. Flynn:

That was J. R. Robbe and he was paid by the Sunset Canal Company. He was under my orders.

Redirect Examination

By Mr. Hannett:

The State of New Mexico is paying me.

Gov. Hannett: Now comes Parley P. Jones, Hiram Pace, R. W. Brooks and Rachael Jensen, summoned in this case as officers and directors of the Sunset Canal Company, and appearing specially for the purpose of this motion and for no other purpose, move the Court to quash the rule to show cause and the service of such rule upon them as such officers and directors. (1) That they are citizens and residents of the State of New Mexico and that said rule to show cause was served on them in the State of New Mexico and outside of the territorial jurisdiction of this Court. [667]

If the Court please, we believe the motion is well taken and raises the same question as raised in the Pace motion, and for the reasons stated in support of the Pace motion we take the position that this motion is well taken.

Then we have a further motion. I assume that the Court will take this motion under advisement along with the Pace motion?

The Court: Very well.

Gov. Hannett: We have a further motion to present to the Court to dismiss.

Mr. Flynn: Just a moment, may I have the names of those included in this last motion?

Gov. Hannett: Parley P. Jones, Hiram Pace, R. W. Brooks and Rachael Jensen.

Mr. Flynn: For the record and information of the Court on this motion, our records show that R. W. Brooks in behalf of whom the motion is

made, or one of them, was served in Duncan, State of Arizona.

Gov. Hannett: He was served in Duncan on the original order, but, as I understand it, there was a supplementary order served on him as director, September 21st, and it is that supplementary order that was served in the State of New Mexico, and it is only to that service that this motion is directed.

The Court: You may proceed.

Gov. Hannett: Now comes the respondents and defendants herein, by their attorneys, who are owners of land and water rights described in the final decree entered herein on the 29th day of June, 1935, said lands and water rights appurtenant thereto lying entirely within the State of New Mexico, and moves the Court to [668] vacate said decree and all orders pursuant thereto so far as said decree purports to determine the priority of said water rights and regulates and controls the diversion of said water and the use and enjoyment thereof by these defendants in the State of New Mexico, and as grounds for said motion respectfully shows to the Court, 1st, that the Court was without jurisdiction to try and determine the issues in this cause, insofar as they involve the lands and water rights situate in the State of New Mexico, for the reason that this suit was brought solely for the purpose of quieting the title of the United States to said waters and is a naked suit to quiet title; that as such it was a local action and could be main-

tained only in the State of New Mexico in which said lands and water were situated, and therefore said decree was null and void so far as it affects waters of the Gila River in New Mexico and land to which it is appurtenant or to these defendants who were the owners of water rights and lands in New Mexico. Second, that it appears on the face of said decree that this Honorable Court was without jurisdiction to try the title and to determine the right to the use of waters of the Gila River in New Mexico and to regulate and control the use thereof by appropriators, including this defendant, in the State of New Mexico in the absence of the State of New Mexico as a party to said suit, for the reason that the State of New Mexico is an indispensable party to such controversy, without whose presence in said suit this Honorable Court was without jurisdiction to entertain the said suit or make and enforce said decree, for the following reasons: (a) The interest [669] of the State of New Mexico is directly affected by said decree; (b) The adjudication of the rights of the parties before the Court involves the determination of the rights of the State of New Mexico and because of the absence of the State of New Mexico a decree based upon such determination will not be binding on the State and will lack finality; (c) The issues in this case and the decree entered herein directly and necessarily embrace a determination of the rights of the State of New Mexico and the nature and extent thereof and such rights are so inevitably, un-

avoidably and inextricably tied up and related to the rights of the State of New Mexico that the State of New Mexico is an indispensable party and therefore said decree and orders made pursuant thereto are null and void. Third, that it appears from the face of said decree that it purports to bind and affects the title of the heirs, devisees and assigns of the defendants owning the lands and water rights of the Gila River in New Mexico administered under said decree; that the said land lies entirely within the State of New Mexico and without the territorial jurisdiction of this Court and that the said decree and the orders made pursuant thereto are therefore null and void. Four, that the decree on its face purports to operate directly upon the land and water rights therein described lying entirely within the State of New Mexico and without the territorial jurisdiction of this Honorable Court; that said decree and the orders made pursuant thereto are therefore null and void, and for the further reason that the entities attempted to be named as defendants, the Sunset Canal Company and the Sunset [670] Ditch Company, were not in existence at the time of the entry of this decree; that at the time of the entry of this decree there was no such company in existence as the Sunset Canal Company, and that at the time of the entry of this decree the Sunset Ditch Company was legally dead and no longer had corporate existence. That it does not appear in the original complaint or petition in this cause that the United States of

America, the plaintiff herein, was damaged or threatened with damage, nor does the decree find that the plaintiff herein was damaged or threatened with damage or that the respondents herein in the State of New Mexico were committing any wrong or any tort or violating any of the rights of the plaintiff at the time that this decree and injunctive order was originally entered into.

Gov. Mechem: And, if the Court please, further, as this is a suit to quiet title, that it does not appear from either the amended complaint and does not appear from either of the complaints that, or from any order or decree, that at the time this suit was brought, the United States, in its own behalf or in behalf of any one else, was in the present use and enjoyment of the waters title to which they sought to be quieted. That is under the general rule in the United States Courts as to jurisdiction of the Court to quiet title, in that the plaintiff must be in possession in order to maintain suit to quiet title.

Gov. Hannett: Now, in support of our motion to the Court, we desire to present a brief argument and call the Court's attention to certain authorities.

(After argument [671])

Gov. Hannett: We submit, if the Court please, that our motion is well taken.

Mr. Flynn: Does the Court care to hear any argument in regard to this? It is our belief, your Honor, that the questions raised by these motions

were passed upon by your Honor during the trial, to the effect that they are not properly raised on these proceedings, that this is not the proper place or proceedings to attack the judgment of this Court and all the parties interested in the judgment are not in Court under process; in other words, the only parties in Court are the respondents, only a small number, interested in this decree and parties to it, and naturally an attack on this judgment, to vacate it and set it aside, would have to be served on all the interested parties, in order that they may be in Court.

The Court: I think the question of the jurisdiction of the Court in the matter has not been raised to the same extent that it has been here on this motion, and I would like to be advised as to those points that have been raised by the respondents.

PARLEY P. JONES,

a witness called in behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Flynn:

My name is Parley P. Jones, and I am one of the original defendants in this case and have been served with order to show cause in this proceeding. I still own land in the Virden Valley and received water during the year 1939. Also received water under the administration of Mr. Firth as Water

(Testimony of Parley P. Jones.)

Commissioner since 1936 and paid part of the assessments during that time. [672] Assessments were paid to Mr. Firth. They were not paid by a company. They were paid by our community ditch. The source of those funds was common contributions of labor assessments. They were made general assessments for their general expense and took the assessments out of the funds. I received water through the Sunset Ditch. It is not a corporate entity. It is a community ditch. It is operated by joint efforts of the community. We collect labor assessments. Everybody in the community contributes. Mrs. Jensen collects the money. It is operated under the name of Sunset Ditch Company.

“Mr. Flynn: I show you here a certified copy, certified by the State Engineer of the State of New Mexico, purporting to be an application for permission, an application filed in the office of the State Engineer at Santa Fe, New Mexico, and call your attention to the typed words there, ‘Certified Copy,’ to the name, Sunset Canal Company, Cosper-Windham Canal, by, signed, Parley P. Jones, President.’ Did you execute such an instrument on or about the 16th day of April, 1938?”

Witness: “I don’t know whether I did or not. I don’t recall it.”

Mr. Flynn: “Mr. H. Vearle Payne is your counsel in this matter here, is he not, the gentleman in Court here is your attorney?”

(Testimony of Parley P. Jones.)

Witness: He is acting in connection with the State. He is being paid by the State. He did not represent me before the Interstate Stream Commission. I attended the meeting before the Interstate Stream Commission and went for the purpose of getting the Interstate Stream Commission to do something to relieve me from the decree. I do not recall having signed the document above-referred to. [673]

Mr. Flynn: "During the year 1939, when water was being diverted from the Sunset Canal, or ditch as you call it, and taken to the lands in the Virden Valley there, and distributed thereon, that ditch or company or whatever you want to call it operated and was being managed by some members who were selected for that purpose by the other residents there?"

Witness: The ditch was created in the first place and has been managed at all times through the joint efforts of the people who reside in that valley, and the people who reside in the valley select certain representatives to manage and control it.

Mr. Flynn: "Don't the residents in that valley, the land owners and users, select some one to represent them in the control and management of this ditch and everything that had "to be done in connection with the handling of the ditch, don't they select somebody to represent them, as officers or representatives?"

(Testimony of Parley P. Jones.)

Witness: Surely they do. I signed as President of the Ditch Company when signing anything, but I do not recollect signing the document shown to me. It has been my understanding and my knowledge all the way through that it was the Sunset Ditch Company and operated that way. So far as the canal company I don't know about that. The other persons selected to help manage this company were Hiram Pace, R. W. Brooks and there was a secretary—Mrs. Jensen.

Mr. Flynn: "I have asked you some questions and may have asked you this, the date of this instrument, which is the 16th day of April, 1938, and the H. Vearle Payne, the notary public who took this acknowledgment is [674] *is* the same H. Vearle Payne who is now attorney in the court room here, representing the respondents at this hearing?"

Witness: Yes, the same Mr. Payne that is here. He was not attorney for this company. I do not remember when I became an officer of this company, but we were appointed as a committee in January, 1938. Mr. Fenley Merrill had been president of the company and I took his place. There was a meeting of the land owners and the water users in which this selection occurred. We merely appointed a committee but no one of it was designated as president. They merely selected a committee and then the committee themselves appoints one or chooses one as head of the committee. We

(Testimony of Parley P. Jones.)

have a regular meeting and at it we appoint a committee from the group. The officers are selected by all present at the meeting by vote. I suppose they may be called directors, but I do not recall whether they are referred to as a board of directors. The board itself designates the president and secretary. They vote at the meeting according to acreage. Mr. Merrill had been president prior to my selection for several years. The change was made in 1938. The change was not made to get someone to take more aggressive action in getting relief on this decree. The only changes made in 1938 were the election of myself and Mr. Pace, and when the board that was selected met, I was selected President and Mrs. Jensen Secretary. The Board of the company has been operating under the system above described since the expiration of its charter which was in 1921, and they were operating it in that manner when this suit was filed and during the time of negotiation for settlement and consent decree. [675] It has not been known and operated as the Sunset Canal Company. It is operated under other names including Sunset Ditch. It has not been known as the Sunset Canal Company to my knowledge. However, this document here you show me is written that way, but I have always thought of it as the Sunset Ditch Company. I do not recall having seen the document dated April 6, 1937, you have shown me. In April, 1937, Mr. Fenley F.

(Testimony of Parley P. Jones.)

Merrill was president of the company and Orsen J. Richens was member of the board.

Mr. Flynn: "And would you say now that they weren't at least sometimes known and sometimes operated as the Sunset Canal Company?"

Witness: "Yes, sometimes apparently acted under both, but to my knowledge, I have always thought of that as the Sunset Ditch Company, but they may have operated that way." I may have received a lot of correspondence addressed to the Sunset Canal Company from State Officials of the State of New Mexico and Mr. Firth as Water Commissioner.

Mr. Flynn: "I show you a carbon copy of a letter here, dated April 11, 1939, with the typed name 'Thomas M. McClure, State Engineer,' and ask you if you recall receiving the original of that letter." (Showing letter to witness).

Witness: "Yes, I recall that." It was addressed to me as President of the Sunset Canal Company.

Mr. Flynn: "And then, to refresh your memory, I will show you a carbon copy of a letter, and ask you if all of the mail demands for payments and assessments that you received as an officer of that company from Mr. Firth were not addressed to you as president, either [676] to you as president or to the Sunset Canal Company itself (showing letter to witness)."

Witness: "Well, I couldn't say as to all of them. I suppose they were."

(Testimony of Parley P. Jones.)

After the water was shut off in 1938, Hiram Pace, Hugh Pace, Mr. Fenley Merrill and Mr. Payne and myself as board of directors and officers and representatives of the Sunset Canal Company went down to Safford to see Mr. Firth. Prior to 1939 we paid assessments to Mr. Firth for the water users operating under this decree. After 1939 we continued to use this water from the Gila River. We have not paid any assessments to Mr. Firth or anyone else under that decree for the use of the water, and the company did not make any collection from the water users for that purpose. The water users have not tendered to the company or anyone else money to pay the assessments.

Cross Examination

By Mr. Hannett:

No demand has been made personally on any person to pay the 13¢ per acre for 1939. I don't claim to be a director of any corporation, Sunset Canal Company or Sunset Ditch Company. There is no corporation operating a ditch or canal in the Virden Valley on the north side of the river, and I am not a director or officer of any ditch company serving these respondents.

I am 36 years old. I was not an officer or agent or director of the Sunset Ditch Company when it ceased to exist in 1921, or prior to that date. I never employed the Governor of the State of New Mexico, State Engineer or State Police to represent

(Testimony of Parley P. Jones.)

me for any purpose in connection with the waters of the Gila River, and they have not acted as my agents to my knowledge. [677]

Redirect Examination

By Mr. Flynn:

Mr. Flynn: "You did go up there, though, and ask them to do something about this situation, didn't you?"

Witness: We called on the State Engineer. There was a demand made upon me as President of the Sunset Canal Company, for the payment of the assessments for the year 1939, and it was left to the Secretary of the company. It was a written demand by Mr. Firth, the Water Commissioner, and stated that the payment due in January, the first of the month, was due and that if it was not paid the water would be shut off, and it wasn't paid and the water was shut off.

The voting representation of the different land owners down there is not evidenced by any certificates or shares of stock. We do not have any books.

Mr. Flynn: "How is the acreage determined? Is there a record of that kept by the company, so they will know how many votes a man is entitled to, how do you determine the number of acres he has?"

Witness: "There is no record of it. I think the secretary has no record of that. We have just merely relied on the honesty of them, to state how

(Testimony of Parley P. Jones.)

many acres they have." I have no books or records of the company here with me.

Recross Examination

By Mr. Hannett:

There were originally shares of stock in the Sunset Ditch Company.

Redirect Examination

By Mr. Flynn:

I have seen, in an old record we have there, is the reason I say that, I have seen the stubs of the old shares of stock. [678]

Recross Examination

By Mr. Payne:

There have been a few certificates of stock issued in the Sunset Ditch Company since 1921. I do not recall the number, as a means of satisfying the Federal Land Bank for a loan on some of that land.

Mr. Payne: "In other words, a man who had an application with the Federal Land Bank, some showing had to be made that he was entitled to water through this canal, is that right?"

Witness: Yes, and stock certificates were issued as the only way we had of showing it and there were some issued that way.

(Testimony of Parley P. Jones.)

Redirect Examination

By Mr. Flynn:

Mr. Flynn: "Did you or this company ever furnish to Mr. Firth or anyone representing this Court under this decree any reports of the amount of water diverted and used during the year 1939?"

Witness: "No, sir, not that I know of."

Recross Examination

By Mr. Hannett:

I did not individually divert any water during the year 1939, nor did any respondent divert any water during the year 1939.

Mr. Hannett: The only point of diversion was the Sunset Canal Company, wasn't it—The Sunset Ditch Company?

Witness: Yes, sir.

Mr. Hannett: "Who did the diverting there?"

Witness: The State of New Mexico, its officers.

Redirect Examination

By Mr. Flynn:

Mr. Flynn: "Through these devices that were put in there through Mr. Firth or under his direction or under this decree?" [679]

Witness: They have since been changed, they are not there now. The State of New Mexico owns their own devices. The ones in there when the State Officials took it over were installed under this

(Testimony of Parley P. Jones.)

decree, but since then have been changed, and the only means of diverting water out of this stream is out of this canal in order to get it to land owners.

Petitioners "Exhibit A" for identification was admitted in evidence as "Petitioner's Exhibit A" in evidence, and reads as follows: ("Insert Petitioner's "Exhibit A" in evidence").

Mr. Flynn: At this time, if the Court please, we would like to offer in evidence in this case the original pleadings, the complaint and amended complaint and answer filed in the original suit in this case.

Gov. Hannett: I assume that they are part of the record, but we have no objection.

Mr. Flynn: There may be some question some time arise as to why they were not introduced, and therefore I offer them. The original complaint filed in the Gila River suit.

Mr. Flynn: There was an amended complaint, the original complaint, the amended complaint and the answers thereto filed by the different companies and water users, and for the same reason the decree in this case is offered and also the annual reports of the Water Commissioner for the years 1936, 1937 and 1938.

Gov. Hannett: They are objected to, if the Court please, as being incompetent, irrelevant and immaterial, no foundation laid and no opportunity of

cross-examining the person making the report, and as throwing no light on the issues before the Court here. [680]

The Court: Your objection only goes to the reports?

Gov. Hannett: To the reports only.

The Court: Well, as far as the Water Commissioner's reports, it does not occur to the Court now, the materiality of these reports, and if that is the case, they will be ignored and no foundation has been raised to their introduction.

Mr. Flynn: It is part of the official records of this Court, and if they are admissible no foundation is necessary.

Gov. Hannett: We don't know what is in them, what sort of conclusions drawn or damaging statements.

Mr. Flynn: One of the purposes is to show the operation of this decree under this Court and under the Water Commissioner, and the fact that it was administered to these respondents during the years 1936, 1937 and 1938. And then we expect to offer the reports for the year 1939, for the same reason, to show that there has been nothing done.

The Court: Bearing on what?

Mr. Flynn: Bearing on the administration of the decree in relation to these respondents.

Gov. Hannett: And we interpose the further objection that Mr. Firth is in the court room and we have no opportunity to cross-examine him on that.

The Court: Well, there is a ruling to be made on your objection and I overrule it at this time, Mr. Hannett, but as to the further reports, they are not before the Court yet.

Mr. Flynn: The reports filed for the year 1939 are offered for the same reason, the same purpose. [681]

Gov. Hannett: Same objection.

The Court: Very well, the same ruling.

Gov. Hannett: Exception.

Whereupon,

C. A. FIRTH,

a witness called on behalf of the respondents, being first duly sworn, testified as follows:

Examination

By Mr. Hannett:

I am the Water Commissioner appointed by the court in this case and have been operating under this decree in Hidalgo County up until January 4, 1939. I locked the headgates to the Sunset Canal January 4, 1939, and when the headgate was locked it shut off all water of all the users on that canal. I made a demand on the canal company and the Board of Directors individually and Mr. Jones to pay the assessment of thirteen cents per acre, but I did not make a demand on the individual respondents to pay the assessment.

Gov. Hannett: We Rest, and at this time we desire to make a further motion.

The Court: Proceed.

Gov. Hannet: At this time we move the Court to dismiss the petition and the rule to show cause for all the reasons stated in our motion at the close of our evidence in support of our return to the rule to show cause and for the further reason, now that all the evidence on both sides is before the Court, that there is no evidence proving or tending to prove that any one of these defendants disobeyed any order or decree of this Court; and for the further reason that the order of this Court on which the rule to show cause was issued is in express terms an order to this effect, that the Water Commissioner, Mr. Firth, in [682] event of the failure to pay the thirteen cents an acre, shall turn off the water, and there is not a thing in the order complained of which has been violated by these defendants or any of them, either individually or collectively; and for the further reason that neither the original complaint nor the original decree alleges that any act or conduct on the part of these Respondents, prior to the entering of the original decree or the filing of the original and amended complaint, charges these Respondents or any of them with any wrong-doing or with the commission of any tort or any wrong as a basis for the original jurisdiction of this Court; and for the further reason that it does not appear in the petition on which the rule to show cause and the order was issued,

that it does not appear that the United States was damaged, and this being a civil contempt, the only punishment that could be meted out to these defendants is in the nature of a fine compensatory in its nature to compensate the United States, the plaintiff in this case, for damages sustained by reason of the violation. There is no evidence proving or tending to prove that either the United States or any one else has been damaged. [683]

State of Arizona,

County of Pima—ss.

I, Gertrude E. Mason, do hereby certify that as assistant to the official court reporter in and for the Federal Court at Tucson, Arizona, I was called and sworn to act as reporter for the hearing in the within matter; that I was present at said hearing and took down in shorthand the evidence adduced and the proceedings had, and later transcribed my shorthand notes into typewriting, the foregoing on one hundred forty-one pages, being a full, true and correct transcript thereof, with the exception of certain parts of prolonged argument by counsel.

Witness my hand this 15th day of November, 1939.

(Signed) GERTRUDE E. MASON

Assistant Court Reporter [684]

DEPOSITION OF HON. JOHN E. MILES,
GOVERNOR OF THE STATE OF NEW
MEXICO:

HON. JOHN E. MILES,

having been first duly sworn according to law, was called as a witness on behalf of the Respondent, and being examined by the Hon. A. T. Hannett, testified as follows:

Direct Examination

Q. You may state your name.

A. John E. Miles.

Q. Do you hold any official position?

A. Yes, sir.

Q. What position?

A. Governor of the State of New Mexico.

Q. When were you inducted into the office of Governor of the State of New Mexico?

A. January 2nd, I believe.

Q. 1939? A. Yes, sir.

Q. Were you Governor of the State of New Mexico, duly sworn, qualified and acting as such, from and after that date and up to the present time?

A. Yes, sir.

Q. I will ask you to look at this document, which is entitled "Minutes of the Meeting of the Interstate Stream Commission", dated December 21, 1938, and state whether or not you ever saw those minutes before. A. Yes, sir.

Q. State whether or not they were presented to you by Thomas M. McClure, State Engineer and

(Deposition of John E. Miles.)

Ex-officio Secretary of the Interstate Streams Commission, on the 3rd day of January, 1939? [685]

A. Yes, sir, they were.

Q. State whether or not you read and considered those minutes. A. I did.

Q. Did you thereupon take any action?

A. Yes, sir.

By Mr. Hannett: We offer in evidence a copy of the minutes of the meeting of the Interstate Streams Commission, dated December 21, 1938, and ask that it be marked for purposes of identification as "Respondents' Exhibit No. 1." (Instrument is so marked).

By Mr. Flynn: We reserve the right to object to the materiality of the instrument at the time of the hearing. No objection because of the fact it is a copy.

Q. I will ask you to look at this paper, dated January 3, 1939, marked for purposes of identification "Respondents' Exhibit No. 2", addressed by you as Governor of the State of New Mexico to the Chief of the State Police, Santa Fe, New Mexico, and state whether or not, in response to the resolution of the Interstate Streams Commission, heretofore introduced as Exhibit No. 1 by the Respondents, you took official action, and this letter, marked "Respondents' Exhibit No. 2" was that official action?

A. I did take action, and this is a copy of the letter I wrote.

(Deposition of John E. Miles.)

By Mr. Hannett: We offer in evidence Respondents' Exhibit No. 2. We can have the State Police produce the original if you so desire.

By Mr. Flynn: We will not require the original, but reserve the same right to object to the materiality. [686]

By Mr. Hannett: You may take the witness.

Cross Examination

By Mr. Flynn:

Q. Governor, referring to Respondents' Exhibit No. 1, was that the first information you had received in regard to difficulty down in the Gila River district in regard to the water situation, by New Mexico owners?

A. I think it is, except I may have heard in a general way something about it. But that is the first information that was brought to my attention.

Q. Your action was based then solely upon the action of the Interstate Streams Commission?

A. Yes, sir.

Q. Had you, at any time prior to the receipt of this document, had any conversation with any of the land owners under the Gila River Project with reference to their troubles and their water difficulties under this decree?

A. I don't believe I had, unless they may have mentioned it to me when I was down there, but I knew nothing about it and didn't take much notice. It had never been brought to my attention before.

(Deposition of John E. Miles.)

Q. Prior to the time you received this document, Respondents' Exhibit No. 1, had any land owner in New Mexico, or land owner respondent in this case, come to your office, or come to Santa Fe to see you in reference to their water difficulty?

A. I don't recall anybody ever coming and talking to me about it. As I say, it may have been mentioned to me by some land owner, but nothing was ever brought up to me that would give me any information relative to the matter.

Q. Now, Respondents' Exhibit No. 2 is a letter written [687] by you to the Chief of the State Police, in which you give certain instructions as to what should be done. Prior to writing that letter had anyone else urged this particular action which you suggest in this letter?

A. No, sir, no one had urged it.

Q. Had anyone requested, in addition to the Commission—the Interstate Streams Commission—had anyone else suggested this action be taken by you?

A. No, sir.

Witness dismissed.

THOMAS M. McCLURE,

having been first duly sworn, according to law, was called on behalf of respondents. Being examined by A. T. Hannett, he testified as follows:

My name is Thomas M. McClure. I am State

(Testimony of Thomas M. McClure.)

Engineer of the State of New Mexico and member and Ex-officio Secretary of the Interstate Stream Commission, and I was holding those positions in January, 1939, and throughout the year of 1938. I have custody of the official records of water rights in New Mexico and I administered those rights as State Engineer under the Constitution and laws of this State. I have custody of the minutes and records of the Interstate Stream Commission as Secretary.

(Witness produced letter of November 25, 1938, respondents' Exhibit 3, identified the same as being a true and correct copy of the original, which was then offered in evidence and is attached to witness' deposition as respondents' Exhibit 3.) [688]

(Witness identified copy of resolution passed by Interstate Stream Commission of State of New Mexico, and stated that it was a true and correct copy of the same under date of December 21, 1938, and the same was presented and introduced in evidence as Respondents' Exhibit 4, which is attached to witness' deposition.)

I delivered respondents' Exhibit No. 4 to the Governor on the 3d day of January, 1939, and thereafter the Governor issued an order to the Chief of New Mexico State Police. (Witness identified said order as respondents' Exhibit No. 2) I presented the said order to the Chief of State Police and thereafter the Chief of Police, by letter, instructed State Policeman John Bradford, Jr. of Lordsburg,

(Testimony of Thomas M. McClure.)

New Mexico, ordering him to carry out the instructions of the Governor.

Bradford and I met Mr. C. A. Firth, Federal Court Water Commissioner and his attorney, John Gung'l at Virden, New Mexico. I showed them the order of the Governor to the Chief of Police and requested the said Water Commissioner and his attorney to deliver to witness the keys of all headgates in New Mexico and gauging stations on the Gila River or to remove the locks and chains themselves and turn over the headgates and gauging stations to me, and I also requested them to cease all administrative functions in New Mexico, to which Mr. Gung'l replied that they would refuse the first request and would consent to the second request under protest. I then informed them that it would be necessary to cut the locks off the headgates and gauging stations and that I was placing a water master in charge of the waters of the Gila River in New Mexico.

Previous to that time I had appointed a water [689] master and this is a copy of order creating a water district (which copy was introduced as respondents' Exhibit No. 5 and is attached to witness' deposition). I appointed C. B. Tooley as water master who served until the 21st day of February, when Hugh Pace was appointed water master, and has continued to serve until the present time. I identify respondents' Exhibit 8 as a true and correct copy of the order appointing the said Hugh Pace as water master of the Lower Gila District.

(Testimony of Thomas M. McClure.)

I mailed a letter to the Honorable Albert M. Sames, Judge of the United States District Court for the District of Arizona under date of December 28, 1938, and a letter to C. A. Firth and to State Water Commissioner, Phoenix, Arizona, under the same date. (True and correct copies of these letters were produced by the witness and were introduced in evidence as Respondents' Exhibits 12, 13 and 14 respectively, and are attached to his deposition).

Cross Examination

By Mr. Flynn:

I was present at the meeting of the Interstate Stream Commission referred to in Respondents' Exhibit 3, and there appeared at said meeting Mr. H. Vearle Payne, Henry L. Smith, Hugh Pace, Parley P. Jones and Robert Mortensen.

(Mr. Flynn, attorney for the plaintiff and petitioner, then offered Respondents' Exhibit 3 in evidence to be marked "Petitioner's Exhibit 1.")

It was the first time formal complaint had been made to the Interstate Stream Commission. The date of the meeting was November 22, 1938.

I have studied reports submitted to my office by the water master and knew of the action of the United [690] States District Court for the District of Arizona, regarding the Gila River, and I had in my possession a copy of said decree. After the meeting of November 22, I reviewed Federal Court Water Master's reports and compared diversions

(Testimony of Thomas M. McClure.)

exercised under New Mexico rights to see what effect it was having, and it showed a very decided decrease in water needed by New Mexico users. I made a complete study of the diversions which had been made under the decree and compared it with diversions made before that time. My official action on December 31, 1938, in creating the District was the result of my investigation and was an official act to take over the administration of the waters of New Mexico under rightful authority and was for the purpose of protecting the rights of the water users in the State of New Mexico. The Interstate Stream Commission and I took action on New Mexico rights as filed in State Engineer's office. The effect of action of the Interstate Stream Commission and the State Engineer was to supply New Mexico with water it had not been getting under New Mexico rights from the Gila River, and we did not take into consideration in any manner the rights of appropriators in Arizona, and it was our determination that there were no prior rights in any waters of the Gila River insofar as Arizona land owners are concerned in relation to the rights of the State of New Mexico.

I knew of the decree and its provisions for the administration and distribution of the waters of the Gila River in the State of New Mexico through the headgates and that New Mexico land owners had appeared in that litigation. We did not recognize any priorities in Arizona. In determining what the

(Testimony of Thomas M. McClure.)

New Mexico land owners [691] required for irrigation I took into consideration appropriations made and if water was available over New Mexico users it was delivered to Arizona. We are not basing the land owners' right to use water under the decree but on an adequate water supply—whatever they needed, and I knew that New Mexico land owners had appeared in that litigation. I knew that the decree purported to adjudicate rights in New Mexico, but under legal advice we assumed they had no jurisdiction and I gave it no consideration, and that was the advice of the attorney for the Interstate Stream Commission, Mr. Hannett. Prior to January 4th, 1939, I do not think I notified or discussed with any land owners or officers of a canal or ditch company what action I was going to take. I discussed it with Payne and McHalfey when I issued the letter of December 28th to the court.

After I took charge of the control and distribution of waters in New Mexico, the basis of distribution was adequate water supply and I determined that by the needs. I arrived at that by general study of the needs of the growing season. I had no way of determining whether requests were made by the land owners or officers of the company, and made no provision for any written request by land owners in New Mexico. I instructed the water master to distribute the water as needed and as economical as possible.

(Testimony of Thomas M. McClure.)

I had no objections or complaints from New Mexico land owners and heard of none being made the Interstate Stream Commission. There were no requests made upon me by New Mexico land owners or water users or canal companies that the Water Commissioner appointed by the District Court of Arizona be permitted to distribute [692] the waters in accordance with the decree of the District Court of Arizona.

Mr. Payne and Mr. McHalfey are attorneys. They did not state they were acting for any land owners or canal companies.

Redirect Examination

By Mr. Hannett:

Neither the State of Arizona, nor any citizen of Arizona, nor corporate entity of Arizona, nor the United States of America has ever filed in my office any appropriation of the waters of the Gila River in the State of New Mexico. Water was not delivered to anyone by the water master appointed by me who did not have a water right filed in the State Engineer's office. I have had a number of conversations with Payne and McHalfey dealing with the Virden area and they have been in regard to general construction problems, ditches, dams, but the first I had in relation to this matter was on November 22.

The owners or the users of water on approximately half of the acreage described in the complaint and described in the decree and who used

(Testimony of Thomas M. McClure.)

water for the year 1939 are not parties to this suit.

When Mr. Firth locked the gates he deprived not only the people who are parties defendant who are water users of the Gila, but also deprived those—approximately fifty per cent—who are not parties defendant.

Mr. Payne may have appeared before me in August, 1938.

I meant that half of the present owners of the acreage were not parties defendant under the decree at the time of the entering of the decree in 1935. We have checked the decreed rights under the decree against the defendants named in the complaint. No water users that [693] I know of made any complaint to me or to the Interstate Stream Commission about the administration of the decree. There might have been some, I am not sure. I believe that the owners in Arizona and in New Mexico are both entitled to an equitable apportionment of the waters of the Gila River, and since I have been administering the waters I believe the Arizona rights have been fulfilled when they requested it under our administration, but I did not take into consideration the rights or priorities of Arizona water users, but only the fact that there was water available when New Mexico land owners wanted it.

I attempted to make an equitable distribution of the waters between the State of Arizona and the State of New Mexico at all times.

JOHN R. BRADFORD, JR.,

being first duly sworn, according to law, called as a witness on behalf of the respondents, being examined by A. T. Hannett, testified as follows:

My name is John R. Bradford, Jr. I am an employee of the State of New Mexico as member of the State Police. On January 4, I received a written communication from the Chief of Police and the Governor of the State of New Mexico. They were delivered to me by Mr. McClure. I identify Respondents' Exhibit 2 as a copy of that order.

After receiving the order, Mr. McClure and I went to the Virden District where I saw water commissioner, Mr. Firth, and his attorney, Mr. Gung'l. Mr. McClure requested Mr. Firth that this situation be turned over to him. Whereupon Firth said he could not do that. Then I cut the locks off the gates and opened the headgates. [694]

MR. COSME R. GARCIA,

having been first duly sworn according to law, was called as a witness on behalf of the Respondents, and being examined by Hon. A. T. Hannett, testified as follows:

Direct Examination

Q. You may state your name.

A. Cosme R. Garcia.

Q. Do you hold any official position with the

(Testimony of Mr. Cosme R. Garcia.)

State Corporation Commission for the State of New Mexico? A. Yes, sir.

Q. What position?

A. I am Chief Clerk of the Corporation Commission.

Q. As such, do you have the care and custody of the records of the Corporation Commission?

A. Yes, sir.

Q. Does that include all corporations that have been incorporated from the time that New Mexico was formed as a territory, down through statehood, to the present time? A. Yes, sir.

Q. State whether or not a corporation by the name of Sunset Canal Company has ever been incorporated under the laws of the State of New Mexico?

A. I have made diligent search of the records, and have not been able to find any record of it.

Q. Has there been a corporation formed by the name of Sunset Ditch Company?

A. Yes, our records so show.

Q. What does the record show as to the present existence of the Sunset Ditch Company?

A. It shows it was dissolved in the year 1921, June 14th.

Q. Will you read exactly, from your records, the words the [695] record discloses?

A. The index card shows the name, "The Sunset Ditch Company Charter dissolved as per Chap. 185, Laws 1921, June 14, 1921."

(Testimony of Mr. Cosme R. Garcia.)

Q. What do the numerals over here mean?

A. That is Vol. 5, page 231, record No. 3343.

Q. Do you have the Articles of Incorporation of The Sunset Ditch Company?

A. We have them.

Q. Is that part of the official file?

A. Yes, sir.

By Mr. Hannett: We will ask the stenographer to make a copy of that. We offer in evidence the copy of the Articles of Incorporation of The Sunset Ditch Company. (Marked Respondents' Exhibit No. 17).

By Mr. Flynn: No cross-examination.

Witness dismissed.

RESPONDENTS' EXHIBIT No. 1
MINUTES OF THE MEETING OF THE IN-
TERSTATE STREAM COMMISSION
DECEMBER 21, 1938

The Interstate Stream Commission met in the office of the State Engineer at 10:00 A. M., December 21, 1938.

All members of the Commission were present, and also Gov. A. T. Hannett, Attorney for the Commission.

The Minutes of the preceding meeting were read and approved.

The Gila River problem was brought up and after considerable discussion the following resolution was made:

“Whereas, it has been brought to the attention of the Interstate Stream Commission [696] that in the United States District Court for the District of Arizona in the case of *United States v. Gila Valley Irrigation District, et al.*, entered June 29, 1935, a commissioner or water master has been appointed who is administering the waters of the Gila River outside the jurisdiction of said court and within the boundaries of the State of New Mexico, and

“Whereas, it further appears that the Constitution of the State of New Mexico, by the terms of Section 2, Article 16, provides:

“ ‘The unappropriated water of every natural stream, perennial or torrential, within the State of New Mexico, is hereby declared to belong to the public and to be subject to appropriation for beneficial use, in accordance with the laws of the state. Priority of appropriation shall give the better right.’

“And it further appearing that neither the United States of America, the State of Arizona, nor any qualified citizen or body corporate of the State of Arizona, nor any of its residents, nor any officers or agents of the United States, have ever filed with the State Engineer of the State of New Mexico any application for, or made appropriation of, the waters of the Gila

River or any of its tributaries as required by the statutes of the State of New Mexico, and

“Whereas, it appears that the State [697] of New Mexico was not a party to the litigation and could not be made a party to said litigation wherein said water master was appointed, and it further appearing that said water master is acting, so far as he controls water and performs acts within the State of New Mexico, without lawful authority as against the State of New Mexico, and is interfering with the State’s sovereignty of its waters within said State, said Gila River being a perennial stream and having a large number of irrigators who have appropriations under the laws of the State of New Mexico, and

“Whereas, the interference of said water master so appointed as aforesaid is an invasion of the sovereignty of the State of New Mexico and against the peace and dignity of the State of New Mexico,”

Mr. Chavez offered the following resolution and moved its adoption:

“Now, Therefore, Be It Resolved, that the State Engineer of the State of New Mexico be, and he hereby is, empowered and directed to communicate with the said Commissioner or water master so appointed as aforesaid and advise him to cease interference or exercising any jurisdiction or performing any act touch-

ing the use and distribution of the waters of the Gila River within the boundaries of the State of New Mexico, and that upon the refusal of said water master [698] or commissioner to comply with such orders on the part of the State Engineer, the State Engineer is authorized to present this resolution to the Governor of the State of New Mexico, requesting that he exercise his authority as Chief Executive of the State to direct that such measures be taken by the proper officers of the State to enforce this resolution, and the orders of the State Engineer, and

“Be It Further Resolved, that a copy of this resolution be sent to the United States District Court for the District of Arizona and to the State Engineer of the State of Arizona.”

PETITIONER'S EXHIBIT No. 1.

“MINUTES OF MEETING OF THE INTER- STATE STREAM COMMISSION

November 22, 1938

The Interstate Stream Commission met in the office of the State Engineer at 2 P. M., November 22, 1938.

There were present George Keith and Thomas M. McClure, Chairman David Chavez, Jr., being absent. A. T. Hannett, Special Assistant Attorney General and Attorney for the Commission, was also present.

The meeting was called to order by George Keith.

This meeting was called for a hearing of the Lower Gila River Water Users, who were represented by the following gentlemen:

H. Vearle Payne

Henry L. Smith

Hugh Pace

Parley P. Jones

Robert Mortensen [699]

Their problem was presented by Mr. Payne, in which he prayed relief from the present administered Federal Court Decree under the Arizona Federal Court Globe No. 59 Cause. This Decree, since placed in administration in 1936, has deprived the New Mexico water users in the Virden area of their water rights to such an extent that it is becoming impossible to carry on a livelihood by agricultural means.

After hearing a full explanation by Mr. Payne, the Commission decided to make the necessary investigation of all engineering and legal factors to determine the course to pursue in order to remedy this condition.

Mr. McClure, State Engineer, was authorized to make the necessary engineering investigation and Governor Hannett was directed to review the Federal Court case and submit an opinion on the legal procedure to be undertaken by the Commission to remedy the condition—the expenses of the above to be borne by the Interstate Stream Commission.

The Commission authorized the attendance of Governor Hannett and Mr. McClure to the Colorado River Seven States Committee meeting in Phoenix, Arizona, December 14, 1938.”

RESPONDENTS' EXHIBIT No. 2

State of New Mexico
Executive Department

EB

John E. Miles
Governor

Guy Shepard
Secretary

Santa Fe

January 3, 1939

To The Chief of the State Police
Santa Fe, New Mexico

Dear Sir:

Pursuant to a resolution heretofore passed by [700] the Interstate Stream Commission, the State Engineer, Mr. Thomas M. McClure, was instructed to take jurisdiction over the administration of the waters of the Gila River, an interstate stream, and it appearing from said resolution and the records of the said Commission and the State Engineer's office and from other evidence placed before me, that a certain C. A. Firth, and assistants acting under his direction, have assumed unlawful jurisdiction over said stream and are attempting to administer the same without authority and are invading the sovereign proprietary interests in the waters of said stream of the State of New Mexico, and it

further appearing that although requested by the State Engineer, Mr. Thomas M. McClure, to desist from interfering with the waters of said stream and attempting to administer the same, that the said C. A. Firth and his said assistants continue to unlawfully interfere with the State's sovereignty in the waters of said River.

You will therefore under the direction of Mr. Thomas M. McClure, State Engineer, cause the said C. A. Firth and his assistants to desist from in any manner attempting to interfere with the waters of said stream or to administer the same, and you will also put said Thomas M. McClure, State Engineer of the State of New Mexico, in full possession of the facilities for administering the waters of said stream and use such force as may be necessary to eject the said C. A. Firth and his assistants or any other person interfering with the administration of the waters of said river by the said State Engineer, and you will govern yourself accordingly.

Yours very truly,

(Signed)

JOHN E. MILES,

Governor. [701]

RESPONDENTS' EXHIBIT No. 3.

A. T. HANNETT

Attorney at Law

First National Bank Bldg.

P. O. Box 497

Albuquerque, New Mexico

November 25, 1938

Honorable Thomas McClure,
State Engineer,
Santa Fe, New Mexico

Dear Mr. McClure:

At a meeting of the Interstate Streams Commission, held on November 22, at your office, a committee appeared in behalf of the water users of the Gila River in New Mexico, inquiring as to their rights and the rights of the State and of your office relative to a decree entered June 29, 1935, in a case in the District Court of the United States in and for the District of Arizona, entitled "United States of America vs. Gila Valley Irrigation District, et al.," No. Globe Equity 59.

After a careful investigation of the law touching this matter, I have reached the following conclusion:

That as to individuals who appeared in this litigation and submitted themselves to the jurisdiction of the court, they are in all probability bound by the court's decision.

From information given by you and others at the meeting of the Interstate Streams Commission,

I take it for granted and am assuming that neither the Attorney General of the State of New Mexico, the State Engineer, nor any other official of the State of New Mexico ever entered an appearance in this litigation, and that the State of New Mexico never became a party to this litigation. Of course, the State could not properly have been sued [702] in this court in that the Supreme Court of the United States is the only forum which has jurisdiction over any one of the forty-eight sovereign states.

Section 2, Article XVI of the Constitution of the State of New Mexico provides:

“The unappropriated water of every natural stream, perennial or torrential, within the State of New Mexico, is hereby declared to belong to the public and to be subject to appropriations for beneficial use in accordance with the laws of the state. Priority of appropriation shall give the better right.”

I also understood from the information given me at said meeting that neither the United States of America, nor any citizen nor body corporate of the State of Arizona has ever filed with the State Engineer of the State of New Mexico any application for the appropriation of the waters of the Gila River or any of its tributaries as required by our statutes. It is undoubtedly true that Arizona and its inhabitants are entitled to an equitable apportionment of the waters of the Gila. However, the above-mentioned suit was not one, as I understand

it, and could not be one for the purpose of dividing the waters of the river in question between the states and their inhabitants.

I have not seen the complaint, but I take it from the judgment or decree that the suit is in the nature of an action to quiet title to the waters and could not possibly affect anyone who was not a defendant. I understand that there are likewise users of water with valid, subsisting and prior appropriations on the Gila who were never made parties to this suit to quiet [703] title in the United States Court of Arizona. The United States Court for Arizona had jurisdiction only in personam of residents of the State of New Mexico made parties to this litigation who submitted themselves to the jurisdiction of the court. See annotation following the case of *Gunter v. Arlington Mills*, 71 A. L. R. 1351, which reviews all of the authorities except the case of *United States v. Walker River Irrigation District, et al.*, a district court decision of the District Court of Nevada, reported in 11 Fed. Supp. at page 158. The last mentioned case likewise reviews the decisions of the Ninth Circuit Court of Appeals of the United States.

It is my opinion that the residents of the State of New Mexico who submitted to the jurisdiction of the federal court of Arizona in the suit in question did not, and could not, surrender to either the United States or the State of Arizona, or any of its inhabitants any title to the waters of the Gila River, in the face of our constitutional provision above quoted. By complying in obtaining a water

right under our statute, they obtained the usufruct of the stream for domestic and agricultural purposes but they could neither surrender nor abandon that for use in a foreign state as the title under the constitutional provision remained in all of the waters so far as New Mexico's equitable share thereof is concerned in the sovereign state of New Mexico in the nature of a remainder-man as trustee for the public, to be subject to appropriation only under the laws of the State of New Mexico.

As to the Commissioner appointed to enforce the decree in No. 59 Equity, United States of America v. Gila Valley Irrigation District, et al., entered June 29, [704] 1935, the court exceeded its jurisdiction in appointing this officer to carry out its orders outside of the court's territorial jurisdiction so far as the sovereign State of New Mexico is concerned.

It is my opinion that you may take such steps as you deem necessary to prohibit the interference by such Commissioner with the administration of the waters of the Gila River within the boundaries of New Mexico, and that it is your right and your duty to forbid him to interfere with the waters of the Gila River within the boundaries of New Mexico to the detriment of the State or its water users. I suggest, therefore, that you govern yourself accordingly.

Respectfully yours,

(Signed)

A. T. HANNETT,

Special Assistant Attorney General and Attorney
for Interstate Streams Commission.

RESPONDENTS' EXHIBIT No. 5

State of New Mexico,

County of Santa Fe,

In the Office of the State Engineer.

In the Matter of a Water District for The Gila
River Stream System, Hidalgo County, New
Mexico.

ORDER CREATING DISTRICT

This matter coming in for consideration of the State Engineer pursuant to instructions given him by resolution of the Interstate Stream Commission for the State of New Mexico, said resolution being passed at meeting of said Commission on December 21, 1938, and it further [705]

Appearing to the State Engineer that the administration of a certain decree of the United States District Court for Arizona insofar as the State of New Mexico is concerned and its proprietary interests in the waters of the Gila River, that the court acted without jurisdiction, and it is the purpose of the undersigned, to exercise his jurisdiction over the waters of the Gila River in New Mexico;

Now, Therefore, It Is Ordered that all the Gila River System in Hidalgo County, New Mexico, be and the same hereby is created and declared to be a water district known and designated as the Lower Gila River Water District for the purpose of having the waters of said stream system apportioned and distributed by a water master, as provided by the Statutes of the State of New Mexico.

Done at Santa Fe, New Mexico, this 31st day of December, 1938.

[Seal] (Signed) THOMAS M. McCLURE,
State Engineer.

RESPONDENTS' EXHIBIT No. 6

Office of State Engineer,
County of Santa Fe,
Santa Fe, New Mexico.

ORDER APPOINTING WATER-MASTER

I, Thomas M. McClure, State Engineer of the State of New Mexico, by virtue of the authority vested in me by the laws of the State, do hereby appoint C. B. Tooley as Water-Master of the Lower Gila River District, effective the 1st day of January, 1939, for the purpose of administering, carrying out and enforcing the valid water rights of the Gila River within said [706] district; that said Water-Master shall have all the powers and authority with reference to said water in the aforesaid District and the users thereof as are conferred upon a Water-Master under the provisions of Chapter 151, New Mexico Statutes, 1929 Compilation.

In Witness Whereof, I have hereunto set my hand and official seal this 31st day of December, A. D., 1938.

(Signed)

THOMAS M. McCLURE,
State Engineer.

RESPONDENTS' EXHIBIT No. 7

“In the District Court of the United States for the
District of Arizona.

In Equity
No. E-59-Globe

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GILA VALLEY IRRIGATION DISTRICT,
et als.,

Defendants.

Under authority contained in the Decree entered June 29, 1935 in the above cause, the Gila Water Commissioner is in direct charge of all diversions of irrigation water from the Gila River. Notice is hereby given that all persons are warned not to change, alter, tamper, or interfere with the regulation of this headgate. Closed for Non Payment Assessment Due Jan. 1-1939. J. L. Spaw, acting under direct instructions of the Gila Water Commissioner, is the only person authorized to make any changes in the regulation of this gate.

C. A. FIRTH,

Gila Water Commissioner, Safford, Arizona.

Dated this 4th day of Jan. 1939. 10:15 A. M.

(Signed)

C. A. FIRTH. [707]

RESPONDENTS' EXHIBIT No. 8

Office of State Engineer

County of Santa Fe,
Santa Fe, New Mexico.

ORDER APPOINTING WATER-MASTER

I, Thomas M. McClure, State Engineer of the State of New Mexico, by virtue of the authority vested in me by the laws of said state, do hereby appoint Hugh Pace as Water-Master of the Lower Gila District, effective the 22nd day of February, 1939, for the purpose of administering, carrying out and enforcing the valid water rights of the Gila River within said district; that said Water-Master shall have all the powers and authority with reference to said water in the aforesaid district and the users thereof as are conferred upon a Water-Master under the provisions of Chapter 151, New Mexico Statutes, 1929 Compilation.

In Witness Whereof, I have hereunto set my hand and official seal this 21st day of February, A. D. 1939.

[Seal] (Signed) THOMAS M. McCLURE,
State Engineer.

RESPONDENTS' EXHIBIT No. 9

C. A. Firth, Commissioner

United States of America

vs.

Gila Valley Irrigation District Et Al.

E-59 Globe

Office of the

Gila Water Commissioner

P. O. Box 158

Safford, Arizona

January 14, 1939

Filed Jan. 16, 1939. Office State Engineer, Santa Fe, N. M.

Mr. Thomas M. McClure

State Engineer [708]

Santa Fe, New Mexico

Dear Mr. McClure:

In accordance with the Federal Court Decree, it will be necessary that water be delivered to 318.7 acres of lands having rights in Arizona under the Sunset Canal, and also to 1779.6 acres under the Moddle Canal. The present apportionment is 0.1 acre feet per acre.

In all probability there will be a small demand for water for grain and hay land within the next two or three weeks and I want to do everything possible to see that these farmers in Arizona under these canals that have their headings in New Mexico get what water they are entitled to.

As I understand the situation, you are constructing now controls and waste-ways at the Arizona line and will be prepared to measure through Parshall flumes any water that is turned into Arizona. Mr. Tooley told Mr. Spaw, my deputy at Duncan, that he wanted some sort of a written request for quantities and time that water was to be turned to these canals and for this reason I am at this time asking you just what form you will require on this notice and what your regulations will be. If you will send me a sample of the request, I will be glad to give same careful consideration.

These lands in Arizona, in addition to the quantities of water they may be entitled to under apportionment, will still have diversion rights on general priority when the river state is sufficiently high. Normally we may expect such conditions during February and March and at that time I would require about 4. second feet down the Sunset and about 22.0 second feet down the Moddle. [709]

Thanking you to give this matter your attention, I am

Very truly yours,

(Signed)

C. A. FIRTH,

C. A. FIRTH,

Gila Water Commissioner.

RESPONDENTS' EXHIBIT No. 10

State of New Mexico

Office of
State Engineer
Santa Fe

Thomas M. McClure

State Engineer

January 18th, 1939

Mr. C. A. Firth,
Gila Water Commissioner,
P. O. Box 158,
Safford, Arizona.

Dear Mr. Firth:

I am in receipt of your letter of January 14th relating to the release of water to the Arizona users.

I am sending under separate cover a pad of the form we use for requests for release of water by our water masters.

In the use of this form if you will fill in under each ditch the cubic feet per second you desire to have released in each ditch and the time release shall begin from our control near the state line, also the time when it shall cease, we can then cooperate with you so that the exact proportionment under the decree can be delivered to Arizona lands.

If you do not have an apportionment to be made in all three of the ditches at the same time, write the word [710] "None" in line after the ditch or ditches you are not requesting water for.

We are glad to cooperate with you in any manner

to fulfill your duties as Commissioner in serving the lands in Arizona under these ditches.

Very truly yours,

(Signed) THOMAS M. McCLURE,
State Engineer.

RESPONDENTS' EXHIBIT No. 12

State of New Mexico

Office of

State Engineer

Thomas M. McClure

State Engineer

Santa Fe, December 28, 1938

Honorable Albert M. Sames

Judge of the United States District Court

Tucson, Arizona

Re: No. E-59-Globe

United States of America

vs.

Gila Valley Irrigation District, et al.

Dear Sir:

Pursuant to instructions given me by resolution of the Interstate Streams Commission for the State of New Mexico, a copy of which is annexed to this letter, I am hand/ing said resolution to you.

I was likewise advised by the Commission and its attorney that it is not the attitude of the Interstate Streams Commission to be contumacious concerning

the court's decree in this matter, but that the Interstate Streams Commission is convinced that in the decree so far as the State of New Mexico is concerned and its [711] proprietary interests in the waters of the Gila that the court acted without jurisdiction, and that it is the purpose of the Interstate Streams Commission, through the undersigned, to exercise its jurisdiction over the waters of the Gila.

However, the Interstate Streams Commission and the undersigned believe that an amicable adjustment of the matter can be arranged if a meeting can be held with responsible officials of the two states and the United States representing the Indians and either a compact entered into between the states or some other satisfactory adjustment which will be fair and equitable.

From the information and investigations made by this department, we have reached the conclusion that the water is not being equitably distributed and that citizens holding prior rights to waters of the river in this State are being deprived of their rights.

I wish to assure you in my own behalf and in the behalf of the Commission that we would be happy to meet with responsible officials for a discussion of this matter at any time that suits the convenience of such officials.

Respectfully,

(Signed)

THOMAS M. McCLURE,
State Engineer.

RESPONDENTS' EXHIBIT No. 16

Board of Supervisors

Clyde Tingley, Governor

Grover Conroy,

State Highway Engineer,

Secretary.

Chief

E. J. House, Jr.

Address all Communications to New Mexico

State Police [712]

Joseph R. Gallegos,

Member

Santa Fe, N. M.

Box 919

State of New Mexico

Department of Justice

New Mexico State Police

Santa Fe

January 3, 1939

Mr. J. O. Bradford

New Mexico State Police,

Lordsburg, New Mexico

Dear Sir:

This will serve to introduce Mr. Thomas M. McClure, State Engineer, whom you are instructed to assist in any way possible in order that he may carry out his jurisdiction.

He will explain the circumstances.

Very truly yours,

(Signed)

E. J. HOUSE, JR.,

Chief, New Mexico State Police.

RESPONDENTS' EXHIBIT No. 17
"ARTICLES OF INCORPORATION
OF
THE SUNSET DITCH COMPANY

Know All Men By These Presents, that we, the undersigned George H. Cooper, John A. Martin, Sarah A. Moore, Samuel A. Foster and Joseph E. Williams all citizens of the United States of America and the Territory of New Mexico, and all residents of the County of Grant in said Territory, do hereby voluntarily associate ourselves together for the purpose of forming a corporation under [713] the laws of said Territory of New Mexico:

And We Do Certify:

Article I.

The corporate name of said corporation shall be The Sunset Ditch Company.

Article II.

The purposes for which said corporation is formed are as follows, to-wit: (a) To construct, operate and maintain the following mentioned described ditch and water way in said County of Grant and Territory of New Mexico, having for its object the taking and conducting of water from the Gila River in said Grant County, Territory of New Mexico, and the supplying of the same for the purposes of irrigating and improving lands, agricultural, stock-raising, domestic and other beneficial and useful purposes in said County of Grant and Territory of New Mexico, said ditch and water-

way being more particularly described as follows, to-wit:

Said ditch shall be known as "The Sunset Company's Ditch," and shall have a carrying capacity as follows, to-wit, ten feet wide on bottom, and not to exceed four feet in depth; said ditch being more particularly described by the survey of the line thereof as follows, to-wit:

Beginning at a—on a perpendicular bluss on the north side of the Gila River, being S. 7° 45' E. 2683 ft. from the N.W. corner of Sec. 21, Twp. 19 S., R. 20 W. of the N.M.P.M. (b) To construct, operate and maintain all necessary and proper plants, appliances, machinery, dams ditches, pipelines and water ways for distributing said water from the above mentioned and described ditch, or for more effectually carrying out the said purposes of [714] said operation. (c) To acquire, own, lease, sell and transfer real estate and personal property; and generally to do all things necessary or proper in carrying on the business and promoting the said purposes for which said operation is formed.

Article III.

The amount of capital stock of said corporation shall be Fifty Thousand Dollars, divided into Two Hundred Shares of the par value of Twenty Five Dollars per share.

Article IV.

The time for which said corporation shall exist is fifty years from and after the date of its incorporation.

Article V.

The number of directors of said corporation shall be three. The names of the directors who shall manage the business of said corporation for the first year of its existence are the said George H. Casper, John A. Martin, Samuel A. Foster.

Article VI.

The principal place of business of said corporation shall be located at the town of Richmond, in the County of Grant, Territory of New Mexico.

In Witness Whereof, we have hereunto set our hands and affixed our seals this Second day of February A. D. 1903.

[Seal] (Signed) GEORGE H. CASPER

[Seal] (Signed) JOHN A. MARTIN

[Seal] (Signed) SARAH A. MOORE

[Seal] (Signed) SAMUEL A. FOSTER

[Seal] (Signed) JOSEPH E. WILLIAMS [715]

Territory of Arizona,
County of Graham—ss.

On this Second day of February, A. D. 1903, before me the undersigned Notary Public, personally appeared George H. Casper, John A. Martin, Sarah A. Moore, Samuel A. Foster and Joseph E. Williams, to me known to be the persons described in and who executed the foregoing instrument, and they acknowledged that they executed the same as their free act and deed.

In Witness Whereof, I have hereunto set my hand and affixed my Notarial Seal at Duncan, Graham County, Arizona Territory the day and year in this certificate aforesaid.

[Seal] (Signed) J. L. T. WATTERS,
Notary Public.

My Commission expires November 24, 1905.

(Cover indorsements)

No. 3343

Cor. Rec'd. 5 Page 231

Articles of Incorporation of The Sunset
Ditch Company
Indexed "3343"

Filed in Office of Secretary of New Mexico, Feb.
9, 1903. 9 A. M.

J. W. REYNOLDS,
Secretary.

Filing 15—I C C 4.50" [716]

CONDENSED STATEMENT OF REPORTER'S
TRANSCRIPT OF TESTIMONY AND
PROCEEDINGS BEFORE
HONORABLE ALBERT M. SAMES, JUDGE,
TUCSON, ARIZONA, MARCH 11, 1940
(RULE 75-b)

The Court: This is the time, Gentlemen, to consider the findings that have been submitted on the part of the Government and the respondents in the

determination of the judgment along the lines as indicated by the Court some weeks ago.

Gov. Hannett: Now comes the respondents, before judgment entered herein, and respectfully requests the Court to rule as to whether or not the 13¢ per acre for the year 1939 has been merged into the judgment of \$100 each against the respective respondents, or whether the Court rules that they are still indebted to the Commissioner Firth in the sum of 13¢ per acre for the year 1939; and as part of this motion the Court's attention is directed to the fact that the Commissioner Firth has recently made demand on the alleged officers of the alleged **Sunset Canal Company** for 13¢ per acre for the year 1939 for all who used water on the Sunset Ditch, including each of these respondents, and further, whether these individual respondents may pay 13¢ per acre for the year of 1940 and thereupon receive water, under their water rights for the land owned by them, regardless of whether the other users of water pay for that year or whether the Sunset Canal pays for that year.

The Court: You think that raises any matter that is in issue now or that was at issue?

Gov. Hannett: I think it does.

The Court: It occurred to me that possibly in abatement, as this is a civil proceedings and the recovery is for such damages as may be required, for that reason [717] there might be some basis for your motion. Is that it?

Gov. Hannett: We would like to know whether the 13¢ per acre is included in this judgment of

\$100 each or whether they still owe the 13¢ for the year 1939.

The Court: The findings of the Government is that, on account of the failure to pay the 13¢ per acre that the Water Commissioner has been put to the expense of litigation and the added expense of attempting to enforce the decree. That is your *dingings*, Mr. United States Attorney?

Mr. Flynn: Yes, your Honor.

Gov. Hannett: And do I understand that your Honor proposes to make that finding?

The Court: I haven't heard you gentlemen on it yet. It is one of the findings that has been submitted by the Government here, or the petitioner.

Gov. Hannett: We do not care to make any argument, if your Honor please, any further argument.

Mr. Flynn: At this time we have none. I assume the Court will rule now?

The Court: Yes, the motion will be denied.

Gov. Hannett: At this time, if the Court please, we want the record to show this, we ask that the record show before the entry of judgment and before the findings of fact and conclusions of law have been settled subsequent to the hearing and subsequent to the Court's announcement that he fines each of the defendants the sum of \$100, that we object to the Court's imposition of a fine of \$100 each because it is for a round sum of money, not based upon any proved items of loss or expense, but apparently intended to cover probable losses

and expenses, and that if it is imposed by way of indemnity to the aggrieved party, the petitioner, it should not exceed his actual loss incurred [718] by the violation of the injunction, including the expenses of the proceedings necessitated in presenting the offense for the judgment of the Court; and further, that the imposition of the \$100 fine each against each of the respondents is not based upon evidence showing the amount of loss and expense and the said sum of \$100 each is necessarily arbitrary and arrived at by conjecture, and such being the case, the question of its reasonableness cannot be re-examined upon the appeal from the final decree in this cause, and the Appellate Court will necessarily have to treat the fine as a purely arbitrary one or deny the respondents their right to review. The Court's attention is likewise called to the fact that the following named persons, Anna H. Lunt, R. Richens, Ralph Richardson, E. Thygerson, Nancy A. Smith and B. Y. Whipple, each used water for only 1.1 acres of land, which was delivered to them by the municipality of the Town of Virden, which Town is not a party to the original cause or a defendant therein, and that as to the other named respondents against whom the fine of \$100 was assessed, there is no showing as to the amount of acreage for which they used water.

The Court: That is embodied in one of your instructions? Embodied, I should say, in your findings?

Gov. Hannett: Yes, your Honor, but we want the record to show it. As I understand it, under the new rules, with requested findings of fact and conclusions of law, it isn't necessary even to file them and so they are not necessarily a part of the record, and we want the record to show that at this time, and have the record show it is before the Court and the Court considered it.

The Court: Very well. [719]

Gov. Hannett: If the Court please, these findings of fact, number one, proposed by the Government, it would leave the impression that it was only to irrigate the land of Indians. That is not true. As I understand it, there is as much white land as Indian land under this decree, and the decree so shows. That is their new proposed findings of fact number one.

Mr. Flynn: This was instituted by the Government on behalf of the Indians, to determine their respective rights to the use of water from the Gila River and the Gila Valley Irrigation District and other residents of the State of Arizona were made respondents.

Gov. Hannett: Your Honor, for the purposes of the record, there are vast tracts of land owned by white settlers near that owned by the Indians, and the amended complaint in this cause of action recites that it was brought for their benefit as well as the benefit of the Indians.

The Court: That is the only objection you want to point out to the Court with regard to the sub-

stitution of this page one and page one-a? The findings of fact, I think, is a repetition of their first one.

Mr. Flynn: Yes, it is identical with the first one, only we set it up on a separate page there to avoid re-writing the whole findings.

The Court: Now, I understand, of course, Gentlemen, that these proposed findings of fact on behalf of the respondents which have been submitted here are findings based on the line of argument that the Court heard here at the hearing some weeks ago. Is there any occasion for the Court to hear any further opposition on the part of the respondents for the findings that have been [720] submitted by the petitioner, or for urging the Court to consider anything further, urging the Court to consider any of the findings now submitted?

Gov. Hannett: If the Court please, there is one particular finding that we would like to have, if the Court is going to adopt the findings of the Government verbatim, the ones they have submitted, we would like to have this clarified. That is, concerning the activities of the Governor of New Mexico and the State Engineer and the State Police. We have made a requested finding of fact and conclusion of law that they were not the agents of these respondents, and we also request the Court to find that none of these respondents individually did any act toward breaking any lock or diverting any water or opening any headgate. The evidence in that respect is to the effect that they did not do that, but

that the State Engineer and the State Police officers, acting under the direction of the Governor of New Mexico, did those physical acts, and we object to the Court's finding that these respondents did it, when the record shows the contrary.

The Court: Well, as I recall the testimony, for no transcript of the testimony was afforded the Court, but I relied largely upon my recollection, but my impression of the testimony was from one or two of the respondents' witnesses, that they were the State officials and that they acquiesced. Perhaps that impression might not be borne out by the testimony but, as I recall it, it seems to me there was some acquiescence by the Virden people.

Gov. Hannett: Yes, we agree that they acquiesced and there is a lot of difference between acquiescence and actually going out and breaking gates and breaking locks. I think if it was modified to acquiescence, [721] we would have no objection, but to find they did something they did not do, we would object.

Mr. Flynn: Our findings are that they broke or caused them to be broken, their act resulted in the breaking of the lock on the part of the officials, and we think the evidence supports that.

Gov. Hannett: The only ones of the defendants who appeared before the Interstate Stream Commission were Parley P. Jones and Henry L. Smith, and they made a complaint, and there is no showing that anyone else did, and both of them are respondents. I understand there was one other party

with them. There is no charge of conspiracy, if the Court please, neither urged nor any evidence of it. The charge is agency.

The Court: If I understand the Government's position here, the offense was failing to make their payments on the assessments?

Mr. Flynn: Yes, your Honor.

The Court: I think I will let that finding stand. Were there other findings that you wanted to discuss?

Gov. Hannett: Do I understand by that that the Court rules that the Governor of New Mexico and the State officials were the agents of these defendants?

The Court: I am looking now at Finding Number 15-A, that about the 4th day of January, 1939, the said respondents hereinbefore named wilfully and unlawfully broke or caused to be broken the locks on said structures and caused other locks to be placed thereon.

Gov. Hannett: Yes, that is the one, and I understand that your Honor rules that the State officials who did this were the agents of these respondents. That is the charge in their complaint. [722]

Mr. Flynn: That is not the whole charge. I don't think we have to prove they were agents.

The Court: Well, the finding will stand.

Gov. Hannett: And the Court does not rule whether or not they are agents?

The Court: The recital there speaks for itself.

The Court: Well, we had under consideration,

when we recessed, what the amount of the appeal bond would be here, and I understand from you gentlemen that the amount of the fine as to each defendant and five hundred dollars to cover the costs, is that correct?

Gov. Hannett: Yes, your Honor.

The Court: All right; it will be fixed in that amount. [723]

State of Arizona,
County of Pima—ss.

I, Gertrude E. Mason, do hereby certify that I am the assistant to the official court reporter in and for the United States District Court at Tucson, Arizona; that as such assistant court reporter I was present at the hearing in the above entitled matter before the Hon. Albert M. Sames, Judge, and took down in shorthand the proceedings had at said hearing, and later reduced my shorthand notes to type-writing, the foregoing on thirty-six pages, being a full, true and correct transcript thereof, to the best of my skill and ability.

Witness my hand this 13th day of March, 1940.

(Signed)

GERTRUDE E. MASON,

Assistant Court Reporter.

A. T. HANNETT,

M. C. MECHEM,

Attorneys for Appellants.

Received copy this 9th day of April, 1940.

H. S. McCLUSKEY,

JOHN C. GUNG'L,

By H. S. M.

Attorneys for Appellees. [724]

[Endorsed]: Filed Apr. 9, 1940. [725]

[Title of District Court.]

May 1940 Term

At Tucson

MINUTE ENTRY OF THURSDAY,

MAY 16, 1940

(Globe Division)

Honorable Albert M. Sames, United States District
Judge, Presiding

[Title of Cause.]

On motion of Messrs. Mechem and Hannett, attorneys for appellants, filed herein,

It is ordered that the appellants in the contempt proceedings be allowed to substitute for page one of Statement of Points to be Relied Upon by Appellants, filed April 9, 1940, entitled "R. W. Brooks, et al., Appellants, vs. United States of America and C. A. Firth, Appellees", a page entitled "United States of America, Plaintiff, vs. Gila Valley Irrigation District, et al., Defendants", and

It is ordered that the Clerk of this Court make said substitution.

It is further ordered that the appellants in the contempt proceedings be allowed to substitute for page one of Condensed Statement of Reporter's

Transcript of Testimony, filed herein April 9, 1940, entitled "R. W. Brooks, et al., Appellants, vs. United States of America and C. A. Firth, Appellees," a page entitled "United States of America, Plaintiff, vs. Gila Valley Irrigation District, et al., Defendants", and

It is ordered that the Clerk of this Court make said substitution. [726]

[Title of District Court and Cause.]

STIPULATION

It is hereby and herein stipulated by and between counsel for appellants and appellees, that in making up the designation of parts of contents of record on appeal and record on appeal the Clerk of the United States District Court for the District of Arizona shall certify a copy of the decree entered June 29, 1935, including the stipulation for consent to the entry of final decree, as printed by the United States Government Printing Office in 1935 (as shown on the last page thereof), along with the record; and a certified copy of the bound reports of Charles A. Firth, the Court's Water Commissioner, for the years 1936, 1937 and 1938, and the reports for the year 1939 up to November 9, 1939;

It is further stipulated that the appellees herein shall furnish to the Clerk of the Court copies of said instruments to be certified by the said Clerk, and that the appellees herein shall furnish to the Appellate Court four (4) copies each of said instruments in addition to the certified copies;

It is further stipulated that the said instruments shall not be printed as part of the record in this cause but that said instruments may be considered by the Court as a part of the record in this cause for the purpose of appeal, and all the parts thereof which shall be referred to in the briefs shall be published in an appendix to the brief; [727]

It is further stipulated, in regard to the amended complaint referred to in paragraph numbered "13 (d)" of the "Designation of Contents of Record on Appeal", that, in order to avoid setting out the numerous parties-defendant, the record shall show, as set out in said paragraph 13 (d) of the designation of contents of record on appeal, the following:

"The complaint in paragraph I, in addition to the foregoing, named as defendants some 40 canal or ditch companies and irrigation districts and approximately 1500 defendants, comprising municipal corporations, school districts, corporations and persons, residents of Arizona and New Mexico, who are not Indians or wards of the United States or represented by the United States."

Dated April 9, 1940.

H. VEARLE PAYNE,

L. P. McHALFFEY,

Lordsburg, New Mexico.

Of Counsel:

M. C. MECHEM,

A. T. HANNETT,

P. O. Box 497,

Albuquerque, New Mexico.

Attorneys for Appellants.

JOHN C. GUNG'L,

By HSM

Consolidated National

Bank Bldg., Tucson, Ariz.

Attorney for C. A. Firth.

FRANK E. FLYNN,

United States Attorney,

204 U. S. Court House,

Phoenix, Arizona.

H. S. McCLUSKEY,

Special Attorney,

Ellis Building,

Phoenix, Arizona.

Attorneys for Appellees. [728]

[Endorsed]: Filed Apr. 9, 1940. [729]

[Title of District Court and Cause.]

ORDER

This cause coming on to be heard upon motion of the Respondents who have taken an appeal from the judgment of the Court herein finding them guilty of contempt of Court and fining them, for an order directing the Clerk of this Court to file the supersedeas bond heretofore given and approved by this Court on a date subsequent to the entry of this order,

And the Court being fully advised in the premises, it is by the Court

Ordered, that said prayer be granted and that

the Clerk of this Court is hereby directed to file said bond as of this date.

April 10th, 1940.

ALBERT M. SAMES,

United States District Judge.

[Endorsed]: Filed April 10, 1940. [730]

[Title of District Court and Cause.]

EXTRACTS OF REPORTS OF C. A. FIRTH,
WATER COMMISSIONER FOR THE DIS-
TRICT OF ARIZONA FOR THE MONTHS
OF JANUARY TO OCTOBER, 1939, IN-
CLUSIVE, AS PER APPELLANTS' DES-
IGNATION OF PARTS OF RECORD,
ITEM NO. 20, PAGE 14, AND STIPULA-
TION THEREIN MENTIONED.

1. The following excerpts from the January, 1939, report, page 1:

“Two apportionments were made during January to the “Upper Valleys” the total of which amounts to 0.25 acre feet per acre.

“The lake elevation of the San Carlos Reservoir at midnight January 31 was 2,390.36 feet, with 10,210 acre feet of available stored water, gaining 5,900 acre feet during the month. Computed evaporation amounted to 254 acre feet. Water discharged from the dam amounted to 5,810 acre feet according to the U. S. G. S. Records, with a maximum discharge of 145 second feet.

“The indicated consumptive use to date for the “Upper Valleys” calculated in accordance with the decree amounted to—440 acre feet.

“Officials of the State of New Mexico having by force on January 4, 1939, taken control of the canals diverting in New Mexico, the amounts of water diverted by the Sunset, Moddle and Shriver Canals are not shown in this report. It is hoped that the question of jurisdiction over these canals may be legally settled in the near future. The Gila Water Commissioner cannot officially recognize any jurisdiction over the appropriated waters of the Gila River within the territorial scope of the Decree by others.

“Financial: The Sunset Canal Company (New Mexico) is delinquent in the sum of \$158.19; The Moddle Canal Company (New Mexico lands), the sum of \$17.50; York Cattle Company, \$3.24; J. H. Brown, \$1.46; and Tidwell Canal Company the sum of \$29.64. All the above amounts were due and payable January 1, 1939.” [731]

2. The following excerpts from the February, 1939, report, page 1:

“One apportionment was made to the Upper Valleys during February amounting to 0.25 acre feet per acre. Total apportionments to date amount to 0.50 acre feet per acre.

“The indicated consumptive use to date for the “Upper Valleys” calculated in accordance with the decree amounted to—1260 acre feet.

“Financial: The Sunset Canal Company (New Mexico) is delinquent the sum of \$158.19; The Moddle Canal Company (New Mexico) is delinquent the sum of \$17.50; York Cattle Company \$3.24; and J. H. Brown is delinquent the sum of \$1.46. All the above amounts were due and payable January 1, 1939.”

3. The following excerpts from the March, 1939, report, page 1:

“One apportionment was made to the Safford, Duncan and Winkelman valleys during March amounting to 0.08 acre feet per acre. Total apportionments to date amount to 0.58 acre feet per acre.

“The lake elevation of the San Carlos reservoir at midnight March 31st was 2398.41 feet, with 25,090 acre feet of available stored water, gaining 5,110 acre feet during the month. Computed evaporation amounted to 738 acre feet. Water discharged from the dam amounted to 13,810 acre feet with a maximum discharge of 300 second feet.

“The indicated consumptive use to date for the Upper Valleys calculated in accordance with the decree amounted to 13,620 acre feet.

“Financial: The Sunset Canal Company (New Mexico) is delinquent \$158.19; The Moddle Canal Company (New Mexico lands) is de-

linquent \$17.50. These amounts were due and payable on or before January 1st, 1939." [732]

4. The following excerpts from the April, 1939, report, page 1:

"One apportionment was made to the saford, Duncan and Winkelman valleys during April amounting to 0.13127 acre feet per acre. Total apportionments to date amount to 0.71127 acre feet per acre.

"The lake elevation of the San Carlos reservoir at midnight April 30th was 2396.45 feet, with 21,100 acre feet of available stored water, losing 3,980 acre feet during the month. Computed evaporation amounted to 1,223 acre feet. Water discharged from the dam amounted to 22,480 acre feet with a maximum discharge of 487 second feet.

"The indicated consumptive use to date for the "Upper Valleys" calculated in accordance with the decree amounted to 24,190 acre feet.

"Financial: The following accounts are delinquent, having been due and payable on or before January 1, 1939; The Sunset Canal Company (New Mexico) \$158.19; The Moddle Canal Company (New Mexico lands) \$17.50."

5. The following excerpts from the May, 1939, report, page 1:

"The lake elevation of the San Carlos reservoir at midnight May 31st was 2,389.16 feet, with 8,320 acre feet of available stored water,

losing 12,780 acre feet during the month. Computed evaporation amounted to 1,438 acre feet. Water discharged from the dam amounted to 15,460 acre feet, with a maximum discharge of 365 second feet.

“The indicated consumptive use to date for the “Upper Valleys” calculated in accordance with the decree amounted to 28,130 acre feet.

“Financial: The following accounts are delinquent, having been due and payable on or before January 1, 1939; The Sunset Canal Company (New Mexico) \$158.19, and The Moddle Canal Company (New Mexico lands) \$17.50.”

6. The following excerpts from the June, 1939, report, page 1:

“The lake elevation of the San Carlos reservoir at midnight June 30th was 2,383.75 feet, with 900 acre feet of available stored water, losing 7,420 acre feet during the month. Computed evaporation amounted to 1,339 acre feet. Water discharged from the dam amounted to 6,740 acre feet, with a maximum discharge of 186 second feet.

“Financial: The following accounts are delinquent, having been due and payable on or before January 1, 1939: The Sunset Canal Company (New Mexico) \$158.19, and The Moddle Canal Company (New Mexico lands) \$17.50.”

[733]

7. The following excerpts from the July, 1939, report, page 1:

“The lake elevation of the San Carlos reservoir at midnight July 31 was 2,383.42 feet, with 504 acre feet of available stored water, losing 396 acre feet during the month. Computed evaporation amounted to 1,187 acre feet. Water discharged from the dam amounted to 286 acre feet, with a maximum discharge of 22 second feet.

“Financial: The following accounts are delinquent, having been due and payable on or before January 1, 1939: the Sunset Canal Company (New Mexico) \$158.19, and The Moddle Canal Company (New Mexico lands) \$17.50.”

8. The following excerpts from the August, 1939, report, page 1:

“The lake elevation of the San Carlos reservoir at midnight August 31st was 2,389.52 acre feet, with 8,880 acre feet of available stored water, gaining 8,376 acre feet during the month. Computed evaporation amounted to 1,315 acre feet. Water discharged from the dam amounted to 10,460 acre feet, with a maximum discharge of 343 second feet.

“Financial: The following accounts are delinquent: Sunset Canal Company (New Mexico) \$316.38; Moddle Canal Company (New Mexico lands) \$35.00.”

9. The following excerpts from the September, 1939, report, page 1:

“The lake elevation of the San Carlos reservoir at midnight September 30th was 2,389.55 acre feet, with 8,920 acre feet of available stored water, gaining 40 acre feet during the month. Computed evaporation amounted to 1,014 acre feet. Water discharged from the dam amounted to 9,960 acre feet, with a maximum discharge of 290 second feet.

“Financial: The following accounts are delinquent: Sunset Canal Company (New Mexico) \$316.38; Moddle Canal Company (New Mexico lands) \$35.00.”

10. The following excerpts from the October, 1939, report, page 1:

“The lake elevation of the San Carlos reservoir at midnight October 31st was 2,395.59 feet, with 19,410 acre feet of available stored water, gaining 10,490 acre feet during the month. Computed evaporation amounted to 870 acre feet. Water discharged from the dam amounted to 11,360 acre feet, with a maximum discharge of 226 second feet. [734]

“Financial: The following accounts are delinquent: Sunset Canal Company (New Mexico) \$316.38; Moddle Canal Company (New Mexico lands) \$35.00.”

[Endorsed]: Filed Apr. 29, 1940. [735]

[Title of District Court.]

April 1940 Term At Phoenix

MINUTE ENTRY OF SATURDAY,

MAY 18, 1940

(Globe Division)

Honorable Dave W. Ling, United States District
Judge, Presiding.

[Title of Cause.]

On motion of H. S. McCluskey, Esquire, special
counsel for the appellee,

It is ordered that the Clerk of this Court with-
draw page two from Extracts of Reports of C. A.
Firth, Water Commissioner for the District of Ari-
zona for the Months of January to October, 1939,
Inclusive, as per Appellants' Designation of Parts
of Record, Item No. 20, Page 14, and Stipulation
Therein Mentioned, filed April 29, 1940, and substi-
tute in lieu thereof page two, now presented, identi-
cal with said page to be withdrawn but with lines
7 to 16, inclusive thereof, deleted therefrom. [736]

[Title of District Court and Cause.]

STIPULATION

It is herein and hereby stipulated by and between
H. Vearle Payne, L. F. McHalffey, M. C. Mechem
and A. T. Hannett, attorneys for respondents, and
F. E. Flynn, United States Attorney, H. S. Mc-
Cluskey, Special Attorney, and John C. Gung'l, at-
torneys for petitioners, that section 20, line 32,
page 14, and line 1, page 15, of Statement of Points

to be Relied Upon by Defendants, together with Designation of Parts of Record, and that section of the Stipulation referred to therein, reading as follows: “* * * and certified copies of the bound reports of Charles A. Firth, the Court’s Water Commissioner, for the years 1936, 1937 and 1938, AND THE REPORTS FOR THE YEAR 1939 UP TO NOVEMBER 9, 1939”, shall be amended to read:

“* * * and certified copies of the bound reports of Charles A. Firth, the Court’s Water Commissioner, for the years 1936, 1937 and 1938, and the extracts of reports of C. A. Firth, Water Commissioner for the District of Arizona, for the months of January to October, 1939, inclusive, as per defendants’ Designation of Parts of Record, item number 20, page 14, and stipulation therein mentioned, filed April 9, 1940, as amended May 18, 1940, by deleting lines 7 to 16, inclusive, on page 2, thereof, and substituting a new page 2 [737] with said deletion in lieu thereof.”

It is further stipulated that this stipulation be included in said record on appeal.

Dated Phoenix, Arizona, May 18, 1940.

H. VEARLE PAYNE,

By ATH

L. F. McHALFFEY,

By ATH.

Of Counsel:

M. C. MECHEM,

By ATH.

A. T. HANNETT.

Attorneys for Respondents.

F. E. FLYNN,
By HSM,
United States Attorney.
H. S. McCLUSKEY,
Special Attorney.
JOHN C. GUNG'L,
By HSM,
Attorneys for Petitioners.

[Endorsed]: Filed May 22, 1940. [738]

GOVERNMENT'S EXHIBIT A

State of New Mexico,
Office of State Engineer.

I, Thomas M. McClure, duly appointed and qualified State Engineer of the State of New Mexico, do hereby certify that the attached is a true and correct copy of Application for Permit to Change the Place Or Method of Use, on file in this office under Declaration No. 096.

In witness whereof, I hereunto set my hand and official seal this 10th day of October, 1939.

[Seal] THOMAS M. McCLURE. [739]

APPLICATION FOR PERMIT TO CHANGE THE PLACE OR METHOD OF USE

Filed: Jun. 27, 1938. Office State Engineer, Santa Fe, N. M.

Before the State Engineer,
Santa Fe, New Mexico.

Re: Application #096 Filed in the Office of the
State Engineer, Santa Fe, New Mexico.

The undersigned Ezra Curtis, Mrs. E. G. Davidson, widow, Mrs. J. R. Beavers, widow, Mrs. Flor-

ence R. Swafford, widow, W. F. Foster and Lula Foster, his wife, and R. H. Lunt and Pearl Lunt, his wife, vendors and transferors, and M. L. Richins, Floyd A. Brown, Hans Mortensen, R. T. Johns and Robert Mortensen, Mrs. Florence R. Swafford and W. F. Foster, vendees and transferees concurred in by the Sunset Ditch Company (The Cosper-Windham Ditch Company) and the Moddle Canal Company, all of Virden, Hidalgo County, New Mexico hereby make application to change the place of use of water, from the lands separately described herein, to the lands separately described herein, all under the Sunset Canal, (The Cosper-Windham Canal) and the Moddle Canal, of the Gila River, for the reasons as set forth in the statement and exhibits accompanying this application, the right to the use of the water having been acquired by beneficial use and recognized by that certain Decree entered in the District Court of the United States in and for the District of Arizona entitled United States of America, plaintiff, versus D. E. Adams, et al, defendants (In Equity #E-59 Globe):

Florence R. Swafford

Florence R. Swafford has purchased water right held under Court Decree by Ezra Curtis, purchaser from G. V. Lunt, covering eleven acres of land described as follows:

An irregular shaped tract as shown by the Atkinson Survey located in the following subdivisions:

Subdivision	Sec.	Twp.	Rng.	Acres.
W $\frac{1}{2}$ and S $\frac{1}{2}$ of NW $\frac{1}{4}$ SE $\frac{1}{4}$ (Priority of 1917)	33	18S.	21W.	2.8
S $\frac{1}{2}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$, NW $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$, SE $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$	33	18S.	21W	8.2
To be abandoned by Curtis.....				11.0

[740]

Land to Which Water Right Is to Be Transferred

This being an irregular shaped tract as shown by the Atkinson Survey and located in the following subdivisions:

Subdivision	Sec.	Twp.	Rng.	Acres.
S $\frac{1}{2}$ S $\frac{1}{2}$ NE $\frac{1}{2}$ of Lot 2.....	5	19S	21W	1.3
The North $\frac{3}{4}$ s of the SE $\frac{1}{4}$ of Lot 2.....	5	19S	21W	7.5
E $\frac{1}{2}$ E $\frac{1}{2}$ SW $\frac{1}{4}$ of Lot 2.....	5	19S	21W	2.2
				<hr/> 11.0

Florence R. Swafford holds by the said Court Decree the water right for 1.5 acres of land described as follows:

An irregular shaped tract as shown by the Atkinson Survey located in:

Subdivision	Sec.	Twp.	Rng.	Acres.
SW $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ (Priority of 1885).....	32	18S	21W	1.5

Said land to be abandoned and water right transferred to an irregular shaped tract as shown by the Atkinson Survey, belonging to Florence R. Swafford, located in the following subdivisions:

Subdivision	Sec.	Twp.	Rng.	Acres.
N $\frac{1}{2}$ N $\frac{1}{2}$, of Lot 2.....	5	19S	21W	1.14
SE $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$	32	18S	21W	.36
				<hr/> 1.50

M. L. Richins

M. L. Richins has purchased water right held under the said Court Decree by Ezra Curtis, (pur-

chaser from G. V. Lunt) covering five acres of land described as follows:

An irregular shaped tract of land as shown by the Atkinson Survey located in the following subdivisions:

Subdivision	Sec.	Twp.	Rng.	Acres.
NE $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$, (Priority of 1917).....	33	18S	21W	5.0
To be abandoned by Curtis.....				5.0

M. L. Richins has purchased water rights held under the said Court Decree by Mrs. E. G. Davidson covering three acres of land described as follows:

An irregular shaped tract as shown by the Atkinson Survey located in the following subdivisions.

[741]

Subdivision	Sec.	Twp.	Rng.	Acres.
(Priority of 1886)				
N $\frac{1}{2}$ S $\frac{1}{2}$ NE $\frac{1}{4}$, Lot 3 (bounded on the S by fence)	4	19S	21W	1.5
E $\frac{1}{2}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ Lot 3 (bounded on S and W by fence)	4	19S	21W	1.5
To be abandoned by Davidson.....				3.0

Land to Which Water Right Is to Be Transferred

This being an irregular tract as shown by the Atkinson Survey, belonging to M. L. Richins, and located in the following subdivisions:

Subdivision	Sec.	Twp.	Rng.	Acres.
N $\frac{1}{2}$ of Lot 4.....	4	19S	21W	5.0
N $\frac{1}{2}$ N $\frac{1}{2}$ N $\frac{1}{2}$, of Lot 4.....	4	19S	21W	3.0
Total transferred to Richins.....				8.0

Hans Mortensen

Hans Mortensen has purchased water right held under the said Court Decree by Mrs. E. G. Davidson covering five acres of land described as follows:

Subdivision	Sec.	Twp.	Rng.	Acres.
N $\frac{1}{2}$ NE $\frac{1}{4}$ of Lot 3 (Priority of 1886).....	4	19S	21W	5.0
To be abandoned by Davidson.....				5.0

Land to Which Water Right Is to Be Transferred

This being an irregular shaped tract as shown by the Atkinson Survey, belonging to Hans Mortensen, located in the following subdivisions:

Subdivision	Sec.	Twp.	Rng.	Acres.
W $\frac{1}{2}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$,	11	19S	21W	5.0

Floyd A. Brown

Floyd A. Brown has purchased water right held under the said Court Decree by R. H. Lunt, covering three acres of land described as follows:

An irregular shaped tract as shown by the Atkinson Survey located in the following subdivisions:

Subdivision	Sec.	Twp.	Rng.	Acres.
NW $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$, (Priority of 1917).....	33	18S	21W	3.0
To be abandoned by Lunt.....				3.0

[742]

Land to Which Water Right Is to Be Transferred

This being an irregular shaped tract as shown by the Atkinson Survey, belonging to Floyd A. Brown and located in the following subdivisions:

Subdivision	Sec.	Twp.	Rng.	Acres.
NW $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$	3	19S	21W	3.0

Robert Mortensen and Emma Mortensen, Wife of Arvin Mortensen, Deceased, Keith, Mancel, Marcel, Hal, Doris and Flora Mortensen, Children and Heirs at Law of Arvin Mortensen, Deceased.

Robert Mortensen, and Emma Mortensen, wife of Arvin Mortensen, deceased, Keith, Mancel, Marcel, Hal, Doris, and Flora Mortensen, children and heirs of Arvin Mortensen, deceased, have purchased water right held under the said Court Decree by J. R. Beavers, covering 23.5 acres of land described as follows:

An irregular shaped tract as shown by the Atkinson Survey located in the following subdivisions:

Subdivision	Sec.	Twp.	Rng.	Acres.
NW $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ (Priority 1885)	4	19S	21W	1.7
S $\frac{1}{2}$ N $\frac{1}{2}$ SE $\frac{1}{4}$ Lot 2, SE $\frac{1}{4}$ SE $\frac{1}{4}$ Lot 2	4	19S	21W	3.0
NE $\frac{1}{4}$ Lot 2	4	19S	21W	9.0
NW $\frac{1}{4}$ Lot 2 (less 1.1 acres in the SW corner thereof)	4	19S	21W	8.2
N $\frac{1}{2}$ N $\frac{1}{2}$ SE $\frac{1}{4}$ Lot 2.....	4	19S	21W	1.6
To be abandoned by Beavers.....				23.5

Land to Which Water Right Is to Be Transferred

This being an irregular shaped tract as shown by the Atkinson Survey, belonging to Robert Mortensen and the above named heirs, and located in the following subdivisions:

Subdivision	Sec.	Twp.	Rng.	Acres.
S $\frac{1}{2}$ S $\frac{1}{2}$ NE $\frac{1}{4}$	18	19S	20W	20.5
N $\frac{1}{2}$ SE $\frac{1}{4}$, E $\frac{1}{2}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$, SE $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$, of Lot 2.....	3	19S	21W	3.0
Total transferred to Mortensen.....				23.5

R. T. Johns

R. T. Johns has purchased water right held under the said Court Decree by Mrs. J. R. Beavers covering 12.5 acres of land described as follows: [743]

An irregular shaped tract as shown by the Atkinson Survey located in the following subdivisions:

Subdivision	Sec.	Twp.	Rng.	Acres.
NW $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ (Priority of 1885).....	4	19S	21W	1.00
W $\frac{1}{2}$ Lot 1 (Priority of 1898).....	4	19S	21W	11.5
To be abandoned by Beavers.....				12.5

Land to Which Water Right Is to Be Transferred

This being an irregular shaped tract as shown by the Atkinson Survey, belonging to R. T. Johns, and located in the following subdivisions:

Subdivision	Sec.	Twp.	Rng.	Acres.
S $\frac{1}{2}$ S $\frac{1}{2}$ N $\frac{1}{2}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$,	18	19S	20W	3.7
NE $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$,	18	19S	20W	5.1
E $\frac{1}{2}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$	18	19S	20W	3.7
Total transferred to Johns.....				12.5

W. F. Foster

W. F. Foster holds by Court Decree a water right for 22.4 acres of land described as follows:

An irregular shaped tract as shown by the Atkinson Survey located in the following subdivisions:

List No. 1

Subdivision	Sec.	Twp.	Rng.	Acres.
S $\frac{1}{2}$ S $\frac{1}{2}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$	3	19S	21W	2.5
S $\frac{1}{2}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$,	3	19S	21W	1.3
W $\frac{1}{2}$ W $\frac{1}{2}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$,	3	19S	21W	0.3
W $\frac{1}{2}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$,	3	19S	21W	5.0
N $\frac{1}{2}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$,	3	19S	21W	5.0
SE $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$,	3	19S	21W	2.2
SW $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$,	3	19S	21W	2.4
				<hr/>
				18.7
NE $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$, (lying north of Shriver Ditch)	10	19S	21W	3.7
				<hr/>
				22.4

Land to be Retained Under List No. 1

S $\frac{1}{2}$ & W $\frac{1}{2}$ of NW $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$	3	19S	21W	1.6
SW $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$,	3	19S	21W	2.5
N $\frac{1}{2}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$,	3	19S	21W	5.0
SE $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$,	3	19S	21W	2.2
N $\frac{1}{2}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$,	3	19S	21W	0.7
				<hr/>
				12.0

Land to be Abandoned Under List No. 1

S $\frac{1}{2}$ S $\frac{1}{2}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$,	3	19S	21W	2.5
S $\frac{1}{2}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$,	3	19S	21W	1.3
				[744]

Subdivision	Sec.	Twp.	Rng.	Acres.
W $\frac{1}{2}$ W $\frac{1}{2}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$,	3	19S	21W	0.3
N $\frac{1}{2}$ & E $\frac{1}{2}$ of NW $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$,	3	19S	21W	1.2
S $\frac{1}{2}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$,	3	19S	21W	1.4
NE $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$ (lying North of Shriver Ditch)	10	19S	21W	3.7
				<hr/>
				10.4

Land to Which Water Right is to be Transferred

N $\frac{1}{2}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$,	3	19S	21W	5.0
N $\frac{1}{2}$ S $\frac{1}{2}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$,	3	19S	21W	1.4
NE $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$,	3	19S	21W	2.5
N $\frac{1}{2}$ & E $\frac{1}{2}$ of NW $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$,	3	19S	21W	0.9
N $\frac{1}{2}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$,	3	19S	21W	0.6
				<hr/>
				10.4

The above named vendors and transferors Mrs. Florence Swafford, widow, Ezra Curtis, Mrs. E. G. Davidson, widow, R. H. Lunt, and Pearl Lunt, his wife, Mrs. J. R. Beavers, widow, W. F. Foster, and Lula Foster, his wife for and in consideration of One Dollar and other valuable considerations have granted, bargained, sold, remised, conveyed, released and confirmed and by these presents do grant, bargain, sell, remise, convey, release and confirm unto their respective vendees and transferees as herein above mentioned all of their right title and interest in and to the water rights appurtenant to those tracts or parcels of land herein above described as belonging to them to have and to hold the said water rights unto the above mentioned vendees and transferees and as appurtenant to the lands above described as belonging to said vendees.

That said sale is made by and with the full and free knowledge and consent of the above named vendors and by and with the consent of the Sunset Canal Company, (The Cosper-Windham Canal Company), and the Moddle Canal Company.

That the vendees herein agree that the said water rights are to become appurtenant to their lands as herein above described by reason of the purchase of the same as herein set forth and they respectively request that the said transfer be approved and confirmed by the State Engineer, Santa Fe, New Mexico, and that the said engineer take such steps as necessary to complete the transfer as is required by law. [745]

In witness whereof the parties hereto have set their hands and seals this 16th day of April, A. D., 1938, and the Sunset Canal Company, (Cosper-Windham Canal Company), and the Moddle Canal Company have hereunto set their names by their presidents the said 16th day of April, A. D., 1938.

SUNSET CANAL COMPANY,
(Cosper-Windham Canal Company)

By (Signed) PARLEY P. JONES,
President.

MODDLE CANAL COMPANY,

By (Signed) JOSEPH D. WILKINS,
President.

(Signed) EZRA CURTIS,

Mrs. Curtis,

(Signed) MRS. E. G. DAVIDSON,

(Signed) W. F. FOSTER,

(Signed) LULA FOSTER,

Mrs. Foster,

(Signed) MRS. PEARL LUNT,X

(Signed) MRS. FLORENCE R. SWAFFORD

(Signed) FLOYD A. BROWN,

(Signed) R. T. JOHNS,

(Signed) MRS. J. R. BEAVERS,

W. F. Foster,

(Signed) RANDALL H. LUNT,X

R. H. Lunt,

(Signed) M. L. RICHINS,

(Signed) HANS MORTENSEN,

(Signed) ROBERT MORTENSEN.

State of New Mexico,
County of Hidalgo—ss.

On this 16th day of April, A. D., 1938, before me personally appeared Parley P. Jones, President of the Sunset Canal Company, (Cosper-Windham Canal Company), and Joseph D. Wilkins, President of the Moddle Canal Company, and Ezra Curtis, Mrs. E. G. Davidson, widow, Mrs. J. R. Beavers, widow, W. F. Foster, Lula Foster, his wife, R. H. Lunt, Pearl Lunt, his wife, Mrs. Florence R. Swafford, widow, M. L. Richins, Floyd A. Brown, Hans Mortensen, R. T. Johns and Robert Mortensen, to me known to be [746] the persons described in and who executed the foregoing instrument and acknowledged that they executed the same as their free act and deed.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] (Signed) H. VEARLE PAYNE,
Notary Public.

My commission expires August 28, 1941. [747]

State of New Mexico,
County of Hidalgo—ss.

On this 16th day of April, 1938, before me appeared Joseph D. Wilkins, to me personally known, who, being by me duly sworn did say that he is the President of the Moddle Canal Company and that the seal affixed to said instrument is the corporate seal of said corporation and that the said instru-

ment was signed and sealed in behalf of said corporation by authority of its Board of Directors and said Joseph D. Wilkins acknowledged said instrument to be the free act and deed of said corporation.

[Seal] (Signed) H. VEARLE PAYNE,
Notary Public.

My commission expires August 28, 1941. [748]

State of New Mexico,
County of Hidalgo—ss.

Comes now Parley P. Jones, President of the Sunset Canal Company, (Cosper-Windham Canal Company), and Joseph D. Wilkins, President of the Moddle Canal Company, and Ezra Curtis, Mrs. E. G. Davidson, widow, Mrs. Jr. R. Beavers, widow, W. F. Foster, Lula Foster, his wife, R. H. Lunt, Pearl Lunt, his wife, Mrs. Florence R. Swafford, widow, M. L. Richins, Floyd A. Brown, Hans Mortensen, R. T. Johns and Robert Mortensen, who being first duly sworn each for himself and not one for the other deposes and says that he or she has read the foregoing application for permit to change the place of use of water rights; that at the time of the ensealing and execution of these instruments he or she is the owner of the tract or parcels of land designated as belonging to him or her in the foregoing application and that he or she has full power and lawful authority to grant, bargain, and sell the same in the manner aforesaid; That the above sale and transfer is made with his or her consent and

that the statements and representations made in the said application are true to the best of their knowledge and belief; Further affiant sayeth not.

(Signed) MRS. FLORENCER SWAFFORD,

(Signed) MRS. E. G. DAVIDSON,

(Signed) FLOYD A. BROWN,

(Signed) MRS. J. R. BEAVERS,

(Signed) M. L. RICHINS,

(Signed) W. F. FOSTER,

(Signed) LULA FOSTER,

(Signed) EZRA CURTIS,

(Signed) HANS MORTENSEN,

(Signed) ROBERT MORTENSEN,

(Signed) R. T. JOHNS,

(Signed) MRS. PEARL LUNT,X

(Signed) RANDALL H. LUNT,X

(Signed) PARLEY P. JONES,

(Signed) JOSEPH D. WILKINS.

Subscribed and sworn before me this 16th day of April, A. D., 1938.

[Seal] (Signed) H. VEARLE PAYNE,

Notary Public.

My commission expires August 28, 1941. [749]

[Endorsed]: Govts. Exhibit No. A admitted and filed Nov. 9, 1939. [750]

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING
RECORD AND DOCKETING APPEAL

This cause coming on to be heard upon motion of respondents-appellants for an extension of time within which the record of appeal to the United States Circuit Court of Appeals of the Ninth Circuit may be filed and docketed in said court and the court being fully advised in the premises:

It is by the court ordered that the time for filing said record of appeal and docketing said action in the said United States Circuit Court be and hereby is extended until the 15th day of June, 1940.

ALBERT M. SAMES,

United States District Judge.

[Endorsed]: Filed Apr. 10, 1940. [751]

[Title of District Court.]

United States of America,
District of Arizona—ss.

I, Edward W. Scruggs, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said Court, including the records, papers and files in the case of United States of America, Plaintiff, versus Gila Valley Irrigation District, et al, Defendants, numbered E-59—Globe, on the docket of said Court.

I further certify that the foregoing pages numbered 1 to 751, inclusive, contain a full, true and correct transcript of the proceedings of said cause and all papers filed therein, together with the endorsements of filing thereon, called for in appellants' designation of the portions of the record, proceedings and evidence to be contained in the record on appeal from the judgment of contempt and fine thereon entered March 11, 1940, in the above-entitled cause, and in the stipulations designating the contents of said record filed in said cause and made a part of the transcript attached hereto, as the same appear from the originals of record and on file in my office as such Clerk, in the City of Tucson, State and District aforesaid.

I further certify that the Clerk's fee for preparing and certifying to this said transcript of record amounts to the sum of \$325.45, and that said sum has been paid to me by counsel for the appellants.

Witness my hand and the seal of said Court this 8th day of June, 1940.

[Seal]

EDWARD W. SCRUGGS,

Clerk.

[Endorsed]: No. 9544. United States Circuit Court of Appeals for the Ninth Circuit. R. W. Brooks, Carl M. Donaldson, Byron Echols, B. J. Gale, G. Lynn Hatch, Rachel Jensen, Milton N. Jensen, R. T. Johns, Willard E. Jones, John B. Jones, Parley P. Jones, T. V. Jones, P. L. Lunt, Fenley F. Merrill, Orson A. Merrill, Hans Mortensen, Leslie B. Payne, Orson J. Richens, Henry L. Smith, Florence R. Swofford, Mary Jane Jones, Anna H. Lunt, Nancy O. Pace, Junius E. Payne, J. E. Payne, Trustee of the Church of Jesus Christ of Latter Day Saints, E. C. Payne, Ralph Richardson, R. Richens, Nancy A. Smith, E. Thygerson, and B. Y. Whipple, Appellants, vs. United States of America, and C. A. Firth, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Arizona.

Filed: June 10, 1940.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 9544

R. W. BROOKS, et al,

Appellants,

vs.

UNITED STATES OF AMERICA, and
C. A. FIRTH,

Appellees.

STATEMENT OF POINTS TO BE RELIED
UPON BY APPELLANTS, TOGETHER
WITH DESIGNATION OF PARTS OF
RECORD TO BE PRINTED

Pursuant to sub-division 6 of Rule 19 of the Rules of the United States Circuit Court of Appeals for the Ninth Circuit, appellants make the following statement of points upon which they intend to rely upon this appeal, together with designation of the parts of the record to be printed.

Points

Appellants adopt all of the Statement of Points appearing in the transcript of record as certified by the Clerk of the United States District Court for Arizona now on file in this cause, being Points I to XXXI inclusive.

Designation of Record to Be Printed

Appellants designate to be printed the entire transcript of record as certified to by the Clerk of

the United States District Court for the District of Arizona now on file in this cause.

As per stipulation, the decree entered June 29, 1935, in the United States District Court for the District of Arizona, and annual reports of C. A. Firth for the years 1936, 1937, and 1938, are not to be printed.

A. T. HANNETT,

M. C. MECHEM,

Attorneys for Appellants.

[Endorsed]: Filed June 15, 1940. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

STIPULATION

It is hereby and herein stipulated by and between counsel for appellants and appellees, that in making up the designation of parts of contents of record on appeal and record on appeal the Clerk of the United States District Court for the District of Arizona shall certify a copy of the decree entered June 29, 1935, including the stipulation for consent to the entry of final decree, as printed by the United States Government Printing Office in 1935 (as shown on the last page thereof), along with the record; and certified copies of the bound reports of Charles A. Firth, the Court's Water Commissioner, for the years 1936, 1937 and 1938, and the extracts

of reports of C. A. Firth, Water Commissioner for the District of Arizona, for the months of January to October, 1939, inclusive, as per defendants' Designation of Parts of Records, item number 20, page 14;

It is further stipulated that the appellees herein shall furnish to the Clerk of this Court copies of said instruments to be certified by the said Clerk of the United States District Court for the District of Arizona, and that the appellees herein shall furnish to this court four (4) copies each of said instruments in addition to the certified copies;

It is further stipulated that the said instruments shall not be printed as part of the record in this cause but that said instruments may be considered by this court as a part of the record in this cause for the purpose of appeal, and all the parts thereof which shall be referred to in the briefs shall be printed in an appendix to the briefs.

M. C. MECHEM,

P. O. Box 497,

Albuquerque, New Mexico.

A. T. HANNETT,

P. O. Box 497,

Albuquerque, New Mexico.

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Attorneys for Appellees.

JOHN C. GUNG'L

By H. S. Mc
Consolidated National Bank
Bldg., Tucson, Arizona,
Attorney for C. A. Firth.

So Ordered.

FRANCIS A. GARRECHT,
United States Circuit Judge.

[Endorsed]: Filed June 28, 1940. Paul P.
O'Brien, Clerk.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

R. W. BROOKS, CARL M. DONALDSON, BYRON
ECHOLS, B. J. GALE, G. LYNN HATCH,
RACHEL JENSEN, MILTON N. JENSEN, R.
T. JOHNS, WILLARD E. JONES, JOHN B.
JONES, PARLEY P. JONES, T. V. JONES,
P. L. LUNT, FENLEY F. MERRILL, ORSON
A. MERRILL, HANS MORTENSEN, LESLIE B.
PAYNE, ORSON J. RICHENS, HENRY L.
SMITH, FLORENCE R. SWOFFORD, MARY
JANE JONES, ANNA H. LUNT, NANCY O.
PACE, JUNIUS E. PAYNE, J. E. PAYNE,
Trustee of the Church of Jesus Christ
of Latter Day Saints, E. C. PAYNE,
RALPH RICHARDSON, R. RICHENS, NANCY
A. SMITH, E. THYGERSON, and B. Y.
WHIPPLE, *Appellants,*

VS.

UNITED STATES OF AMERICA and C. A. FIRTH,
Appellees.

Upon Appeal from the District Court of the United States
for the District of Arizona.

BRIEF FOR APPELLANTS.

M. C. MECHEM,

A. T. HANNETT,

First National Bank Building, Albuquerque, New Mexico,

Attorneys for Appellants.

H. VEARLE PAYNE,

L. P. McHALFFEY,

Lordsburg, New Mexico,

Of Counsel.

FILED

AUG 12 1940

PAUL P. O'BRIEN,

CLERK

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IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

R. W. BROOKS, CARL M. DONALDSON, BYRON ECHOLS, B. J. GALE, G. LYNN HATCH, RACHEL JENSEN, MILTON N. JENSEN, R. T. JOHNS, WILLARD E. JONES, JOHN B. JONES, PARLEY P. JONES, T. V. JONES, P. L. LUNT, FENLEY F. MERRILL, ORSON A. MERRILL, HANS MORTENSEN, LESLIE B. PAYNE, ORSON J. RICHENS, HENRY L. SMITH, FLORENCE R. SWOFFORD, MARY JANE JONES, ANNA H. LUNT, NANCY O. PACE, JUNIUS E. PAYNE, J. E. PAYNE, Trustee of the Church of Jesus Christ of Latter Day Saints, E. C. PAYNE, RALPH RICHARDSON, R. RICHENS, NANCY A. SMITH, E. THYGERSON, and B. Y. WHIPPLE,

Appellants,

vs.

UNITED STATES OF AMERICA and C. A. FIRTH,
Appellees.

Upon Appeal from the District Court of the United States
for the District of Arizona.

BRIEF FOR APPELLANTS.

JURISDICTION.

This is an appeal from a final judgment of the United States District Court for Arizona, entered on

March 11, 1940 (R. p. 108), adjudging appellants guilty of contempt for violation of a final decree of said court entered June 28, 1935, and an order of said court pursuant to said decree entered December 9, 1935, in a cause pending in said court entitled, "United States of America, plaintiff, v. Gila Valley Irrigation District, et al., defendants", and numbered Globe-Equity No. 59. The jurisdiction of the District Court was invoked by reason of the United States being a party. (Title 28, U. S. C. A., Sec. 41 (1); Amended Complaint, par. 2, R. p. 2.)

The jurisdiction of this court is invoked under Title 28, U. S. C. A., Sec. 225 (a).

STATEMENT OF THE CASE.

Appellants are the owners of lands and water rights acquired under the laws of New Mexico and situated in the Virden Irrigation District, County of Hidalgo, New Mexico, upon the Gila River.

Appellants were found guilty of contempt of court for violation of the consent decree and of a supplemental order of the court entered December 9, 1935. (R. p. 108.)

The original suit in which the contempt proceedings were had was brought by the United States of America in its own behalf and in behalf of the Pima and San Carlos Indians in Arizona. The suit was brought to quiet title to the water rights of the water users on the Gila River in Arizona and New Mexico

as it flows between a line ten miles east of and parallel to the dividing line between Arizona and New Mexico and the confluence of the Salt River and the Gila River in Arizona. (R. p. 23, par. 15.)

A consent decree was entered June 29, 1935, to which the appellants were parties, by which the priorities of the parties to the suit consenting to the decree were determined, and the defendants, including appellants, were enjoined from diverting water from the River except as provided in the decree.

The decree provides that a Water Commissioner should be appointed by the court to carry out and enforce the provisions of the decree and the instructions and orders of the court; that if any proper order of the Water Commissioner made in accordance with the decree is disobeyed, he is authorized to cut off the water from the ditch used by the person disobeying such order, promptly reporting the action taken to the court; also provides that the salary and expenses of the Water Commissioner and the means of securing funds to pay the same shall be fixed by the orders of the court thereafter to be made. (Appendix pars. XII and XIII.)

On December 9, 1935, the court entered its order appointing C. A. Firth, Water Commissioner, fixing his salary and expenses, and providing further that he should be paid by means of an annual assessment of thirteen cents per each acre of land for which a water right was given by the decree; also that the assessment should be collected from the person designated by the decree as the party entitled to divert

water from the Gila River and ordering the Water Commissioner to refuse the delivery of water "to any person entitled to divert so long as such diverter remains in default in the payment of any of its share of the said 13¢ per acre". (R. p. 59.)

By the consent decree entered in this cause June 29, 1935, the defendant Sunset Canal Company and other canal and ditch companies were decreed the sole right to divert water from the Gila River for the use of water users in Arizona and New Mexico above the San Carlos Reservoir (Coolidge Dam), including lands of these appellants (Appendix pars. V and VIII), whose rights and priorities were adjudicated by said decree.

PLEADINGS.

On September 1, 1939, Firth, the Water Commissioner, filed his petition in this cause (R. p. 46) against Sunset Canal Company and these appellants and other defendants in said cause alleging:

(a) That this suit was instituted by the United States of America for the purpose of adjudicating and determining the priority rights to the use of the waters of the Gila River.

(b) That on June 29, 1935, a decree was entered in said cause signed by all the parties, including appellants and Sunset Canal Company, which decree adjudicated the rights of the appellants and others to the use of the water of the Gila River and forever enjoined appellants and other defendants from di-

verting water from the Gila River except under such rights as are determined and allowed by such decree.

(c) That the Sunset Canal Company is the owner of the Sunset Canal mentioned in said decree, and appellants claim the right to use water from the Gila River diverted by the Sunset Canal Company through the said canal and that all parties complained of have, for a long time, recognized said decree and operated thereunder.

(d) That on December 9, 1935, pursuant to said decree an order was entered in this cause fixing the amount of assessments to pay costs and expenses of administration of said decree.

(e) That on or about January 1, 1939, Firth made demand on the Sunset Canal Company for the payment of the water assessment for the first half of the year 1939, and that upon refusal to pay the same for the first half of the year 1939, said petitioner cut off the water from the Sunset canal.

(f) That since January 4, 1939, Sunset Canal Company and appellants have diverted and used the waters of the Gila River in violation of said decree and orders.

(g) That on January 4, 1939, at the Town of Virden, New Mexico, Thomas McClure, C. B. Tooley and John Bradford, Jr., claiming to act as officers and by authority of the State of New Mexico, demanded of Firth the surrender of the keys to the headgates and diverting structures of the Sunset Canal in New Mexico; and upon his refusal to sur-

render same, they broke the locks thereon and took possession of the Sunset Canal in New Mexico, and ever since have been in possession of said canal and have diverted and distributed the waters of the Gila River to the water users owning lands and water rights in New Mexico served by said ditch, including the appellants, and further alleged on information and belief that all of said acts were done by said McClure, Tooley and Bradford as agents of the appellants.

Appellants by their return alleged (R. p. 77):

(a) That there was not now and never had been a corporation known as the Sunset Canal Company in New Mexico nor had said corporation ever owned the Sunset Canal or the diverting structures thereon.

(b) That no corporation ever had or claimed the right to appropriate or divert water from the Gila River in New Mexico.

(c) That they were defendants in said cause and had consented to the entry of said consent decree and their lands lie in New Mexico and are irrigated by water of the Gila River by means of the Sunset Canal.

(d) That thirty defendants named in the final decree were either dead before this suit was filed or before said decree was entered, or have since died or sold their lands and water rights.

(e) They denied that they had diverted water from the Gila River during the year 1939, but admitted they had used such waters diverted by and delivered to them by the water master of the Gila

River in New Mexico appointed by the New Mexico State Engineer.

(f) That acts done by Thomas McClure, C. B. Tooley and John Bradford, Jr., as alleged by petitioner, were done by them in their official capacities as State Engineer of New Mexico, Water Master of the Gila River in New Mexico, and member of the State Police, respectively, acting under the orders and at the direction of the Governor of New Mexico, and that on December 21, 1938, the Interstate Stream Commission, a body charged by the statutes of New Mexico with the duty and authorized to protect and conserve the interests of New Mexico in the interstate rivers of that State, adopted a resolution directing the said State Engineer to demand of said C. A. Firth, Water Commissioner, to cease his control of and interference with the diversion, use and distribution of the waters of the Gila River in New Mexico, and upon Firth's refusal to comply with such request, the said State Engineer was directed to present said resolution to the Governor of New Mexico, requesting him to exercise his authority as Chief Executive of New Mexico to direct that such measures be taken by the proper officers of the State to enforce said resolution; that at all times the said State Engineer has administered said waters in a fair and equitable manner.

(g) That said McClure, Tooley or Bradford, were not appellants' agents; that they did not have control over them, but that all of the acts of said officers were done by them in their respective official capacities and under the direction of the Governor of New Mexico.

(h) That it is impossible to enforce said decree for the reason that half of the area of irrigated land having water rights, on said Gila River, described in said decree, is now owned by persons who were not parties to said suit or to this proceeding, and such persons are entitled to water without regard to said decree.

(i) Appellants denied that they had disobeyed any decree or order of the court.

EVIDENCE.

On November 22, 1938, a meeting of the Interstate Stream Commission was held at Santa Fe, New Mexico, at which appeared two of the appellants and three other persons claiming to represent the Lower Gila River water users, seeking relief from the enforcement of the decree of the United States District Court for Arizona which they claimed deprived the New Mexico water users in the Virden area of their water rights to such an extent that it was becoming impossible to carry on farming. The Commission decided to make the necessary investigation of engineering and legal questions in order to decide what course to take to remedy the condition complained of, and directed the State Engineer and the Commission's attorney to make such investigations. (R. p. 224.) The attorney furnished the Commission an opinion relative to the right of the United States District Court for the District of Arizona to control the waters of the Gila River in New Mexico. (R. p. 227.)

Acting on the advice of the State Engineer and its attorney, the Commission on December 21, 1938, directed the State Engineer to request the United States District Court's Water Commission to relinquish control of the waters of the Gila River in New Mexico, and if he refused to do so to apply to the Governor of New Mexico to exercise his power to put the State Engineer in possession of the diversion and distribution of said waters. (R. pp. 220-223.) The State Engineer also wrote a letter to the Honorable Albert M. Sames, United States District Judge for the District of Arizona, inclosing a copy of the Interstate Stream Commission's resolution. (R. p. 238.)

On January 3, 1939, the Governor ordered the Chief of the State Police to cause the said water commissioner to relinquish control of the waters of said river and to put the State Engineer of New Mexico in possession of the facilities for administering the waters of said stream in New Mexico. (R. p. 225.) Thereafter on January 4, 1939, the State Engineer and John Bradford, Jr., met Mr. Firth and his attorney, John Gung'l, Esquire, at Virden, New Mexico, and demanded possession of the headgates and measuring devices on the Sunset Canal in New Mexico and such possession being refused, the State Policeman Bradford took possession thereof and put the State Engineer in charge. (R. pp. 212-218.) The State Engineer appointed C. B. Tooley water master for the Lower Gila District, and later appointed Hugh Pace water master. (R. p. 212.) The latter continued to act as such during 1939. (R. p. 212.)

In his administration of said waters the State Engineer did not recognize priority of Arizona water rights over New Mexico water rights. (R. pp. 214-215.) He instructed the water master to distribute the water as needed and as economically as possible. (R. p. 215.) Neither the United States of America, the State of Arizona, nor any Arizona resident or Arizona corporation has filed an application to appropriate water of the Gila River in the New Mexico State Engineer's office. (R. p. 216.) The owners and water users of half the acreage in New Mexico described in the complaint and in the consent decree and who used water in 1939 were not parties to said consent decree. When the Water Commissioner Firth cut the water off from the defendants he also deprived the owners who are not defendants of water. (R. p. 217.)

Water from the Gila River is supplied to appellants through the Sunset Ditch. (During 1939 Nancy O. Pace and Mary Jane Jones, appellants, did not use any water from the Gila River. (R. p. 183.)

In 1939 Hugh Pace, Water Master, diverted water from the Gila River by means of the Sunset Ditch. There were approximately 2400 acres of filed water rights under the ditch in New Mexico. Pace delivered water to the water users under the ditch in Arizona when he delivered it to New Mexico water users on the written request of Arizona users. He received requests for water from the Sunset Canal Company. The persons requesting water for the Sunset Canal Company were Parley P. Jones, an appellant, and J.

R. Robbe. At their request Pace turned water into the Sunset Ditch. No other appellant made a request for water. Pace diverted the water in 1937 and 1938 under Firth's direction. He was then employed by Sunset Ditch Company. The company had a ditch rider in 1939. Pace was paid by State of New Mexico for his work as water master in 1939. (R. p. 186.)

Subsequent to the forfeiture of the charter of the Sunset Ditch Company, the business of the Sunset Ditch has been carried on by a voluntary committee which was called a Board of Directors and which was selected by the owners of water rights acquired from the State. The committee held no status recognized by the laws of New Mexico nor was there a ditch company which was a legal entity recognized under the laws of New Mexico. They have used the names of the Sunset Ditch Company and the Sunset Canal Company at different times.

The water right owners contribute money in proportion to the irrigated acreage each owns. The committee selects a president and a secretary. In 1939 the committee was composed of Parley P. Jones, R. W. Brooks and Rachel Jensen, appellants, and Hiram Pace who is not an appellant or a party defendant. Jones was selected president and Mrs. Jensen secretary. The committee has been operating in this manner since 1921 when the Sunset Ditch Company was dissolved and were so acting when the suit was brought and the consent decree was entered.

The assessments were paid to Firth by the committee prior to 1939, but have not been paid since, nor has money to pay them been collected from the water users. A few shares of stock in the Sunset Ditch Company have been issued since 1921 to comply with requirements of the Federal Land Bank. (R. pp. 192-202 inc.) None of the appellants diverted water from the Gila River in 1939. The water was diverted by the officers of the State of New Mexico. (R. p. 185.)

No corporation by the name of the Sunset Canal Company has ever been incorporated under the laws of the Territory or State of New Mexico. The Sunset Ditch Company was incorporated under the laws of the Territory of New Mexico February 9, 1903, and was dissolved June 14, 1921. (R. p. 219.) The Sunset Ditch Company was not authorized by its charter to appropriate water for beneficial use, but was granted power to build, operate and control a ditch to be known as "Sunset Company's Ditch" to take water from the Gila River in Grant County (Hidalgo County), Territory of New Mexico, and supply same for purposes of irrigation in Grant County (Hidalgo County), Territory of New Mexico. (R. p. 241.)

Demand was made by the Water Commissioner upon the Sunset Canal Company and appellants, Jones, Brooks, Jensen and Pace, directors, to pay the assessments, but no demand was made by the Commissioner on any other appellant. (R. p. 204.)

**COURT'S FINDINGS OF FACT AND CONCLUSIONS
OF LAW.**

The court made the following findings of fact:

“II.

“That the Sunset Ditch Company was, in 1903, duly incorporated under the laws of the State of New Mexico; that thereafter said corporation took possession of and thereafter managed and operated the Sunset Canal; that at the time the Court acquired jurisdiction in this cause, said corporation was doing business under the name of ‘Sunset Canal Company’ in the states of Arizona and New Mexico, and ever since has been, and now is, doing business under said name; that during all of said time, the officers, agents and representatives of said corporation have acted for said corporation by using the name ‘Sunset Canal Company’, and still continue so to do; that the Sunset Canal Company is identical with the corporation organized and incorporated in 1903, under the laws of the State of New Mexico under the name of Sunset Ditch Company, and is referred to as a party-defendant herein under both names. (R. p. 131.)

“III and IV.

“That Parley P. Jones, R. W. Brooks, Rachael Jensen and Hiram Pace were officers and directors of the Sunset Canal Company during the year 1939. (R. p. 132.)

* * * * *

“XI.

“That, in accordance with said order, the Water Commissioner duly notified each party entitled to divert water from the Gila River, including respondent Sunset Canal Company, to pay 13¢ per acre for all lands for which it was entitled to divert; that the Sunset Canal Company collected said sum from all the water users under its system, including each of the respondents herein, and paid said sum to the Water Commissioner for the years 1936, 1937, and 1938. (R. p. 138.)

* * * * *

“XV.

“(A) That on or about January 4, 1939, said respondents hereinbefore named, and each of them, wilfully and unlawfully broke, or caused to be broken, the locks on said diverting structures and measuring devices and caused other locks to be placed thereon;

“(B) That the respondent Sunset Canal Company, and its officers and agents, at all times since the 4th day of January, 1939, have failed and refused to provide adequate locking facilities, or accurate measuring or automatic recording devices, for the use of the Water Commissioner, as provided for in the order of this Court; that said respondent has refused to deliver to the Water Commissioner keys to such locks that were placed on the headgates and recording gauges owned by said Sunset Canal Company, and has denied said Water Commissioner access thereto; and

that said respondent has refused and failed, and still continues to refuse and fail, to furnish the Water Commissioner information as to the amount of water diverted from the Gila River, by said respondent and delivered to the lands under its system during the calendar year 1939;

“(C) That said respondents, and each of them, during the year 1939, denied the right of the Water Commissioner to regulate or control the diversion or distribution of the waters of the Gila River into the Sunset Canal in the State of New Mexico; that during the year 1939, the respondent, Sunset Canal Company, without paying therefor as provided by the decree and order of this Court, wilfully and wrongfully diverted water from the Gila River in the State of New Mexico, and carried the same through the Sunset Canal to the lands of respondents owning or operating lands in the State of New Mexico, and that such respondents wilfully and wrongfully used said water in irrigating the respective lands owned or operated by them (R. p. 141).”

The court made the following conclusions of law:

“3. That at the time of the entry of the decree herein, on the 29th day of June, 1935, the Sunset Canal Company was, ever since has been, and now is, a corporation doing business in the states of Arizona and New Mexico and within the jurisdiction of this Court; (R. 143)

“4. That by their acts and conduct, the respondents
* * * have violated the terms of said decree and

orders of Court made pursuant thereto; that they have held in contempt the decree and the injunction therein contained, the orders and officer of this Court and that judgment should be entered herein finding and adjudging said respondents, and each of them, guilty of contempt. (R. p. 143.)”

JUDGMENT.

Judgment was entered finding the Sunset Canal Company and appellants guilty of contempt and fining them \$100.00 each for the benefit of C. A. Firth, Water Commissioner, to pay the extraordinary expenses incurred by him in the prosecution of appellants and for such other expenses as he has or may incur in the administration of the decree. (R. p. 145.)

SPECIFICATIONS OF ERROR.

I. The court erred in overruling appellants' motion to vacate the decree in so far as it affects water rights in New Mexico, and appellants' motion to dismiss because the suit in which it was entered was an action to quiet title to waters in the State of New Mexico.

Motion to Vacate Decree (R. p. 188); Motion to Dismiss (R. p. 205); Points to be Relied Upon No. I (R. p. 150).

II. The court erred in overruling appellants' motion to vacate the decree in so far as it affects water

rights in New Mexico and appellants' motion to dismiss because New Mexico is an indispensable party.

Motion to Vacate Decree (R. p. 188); Motion to Dismiss (R. p. 205); Points to be Relied Upon No. VII, VIII and IX (R. pp. 152-153).

III. The court erred in overruling appellants' motion to vacate the decree in so far as it affects water rights in New Mexico and appellants' motion to dismiss for the reason that the decree is a nullity as to successors in title to defendants who have died or sold their property since the date of the decree.

Motion to Vacate Decree (R. p. 188); Motion to Dismiss (R. p. 205); Points to be Relied Upon No. XIV (R. p. 155).

IV. The court erred in overruling appellants' motion to vacate the decree in so far as it affects water rights in New Mexico and motion to dismiss because said decree and order operate directly upon the Gila River and canals in New Mexico.

Motion to Vacate (R. p. 188); Motion to Dismiss (R. p. 205); Points to be Relied Upon No. XIV (R. p. 155).

V. The court erred in making Finding of Fact No. II (R. p. 131) that the Sunset Ditch Company was a corporation at the time the court acquired jurisdiction in this cause.

Motion to Vacate Decree (R. p. 188); Motion to Dismiss (R. p. 205); Points to be Relied Upon No. XIII (R. p. 154).

VI. The court erred in overruling the motion of Parley P. Jones, R. W. Brooks, and Rachel Jensen to quash process and service upon them in New Mexico.

Motion to Quash (R. p. 187); Points to be Relied Upon No. XII and XXIII (R. pp. 154, 159).

VII. The court erred in refusing to permit appellants to prove that the waters of the Gila River claimed to be diverted in violation of the court's decree and order would not have benefited any Arizona water users, including plaintiff's wards, if it had not been so diverted.

Tender of Proof (R. pp. 171-174 inc.); Points to be Relied Upon No. XVI and XVII (R. p. 156).

VIII. The court erred in refusing to permit appellants to prove that the court's order and decree were physically impossible of enforcement in New Mexico because one-half of the water rights adjudicated by said decree are now owned and operated by persons who are not parties to this suit.

Tender of Proof (R. pp. 175-176; Points to be Relied Upon No. XXI (R. p. 158).

IX. The court erred in ruling that the burden of proof was upon the appellants to prove that they were not guilty of the charges of contempt made against them.

Appellants' Exception (R. p. 169); Points to be Relied Upon No. XXVII (R. p. 160).

X. The court erred in overruling appellants' motion to dismiss the petition and rule to show cause for the reason that the evidence before the court failed to show that the appellants, or any of them, disobeyed the decree or any order of the court.

Motion to Dismiss (R. p. 205); Points to be Relied Upon No. XXVIII (R. p. 160).

XI. The fine imposed of \$100.00 each on the appellants is for a round sum of money not based upon any proved item or items of expense, but intended to cover probable losses and expense and that if imposed by way of indemnity to the petitioner it should not exceed his actual loss incurred by the violation of the injunction, including the expense of the proceedings necessitated in presenting the offense for the judgment of the court, and is not based upon evidence showing the amount of loss and expense, and the sum of \$100.00 is necessarily arbitrary, arrived at by conjecture, and that the said fine is punitive and not remedial.

Exceptions to Court's Proposed Judgment (R. pp. 246-247); Points to be Relied Upon No. XXX (R. p. 160).

XII. If failure to pay the thirteen cents per acre constitutes contempt, the only relief the trial court could have granted the petitioner was to imprison the appellants until they had paid said thirteen cents per acre.

Points to be Relied Upon No. XXXI (R. p. 161).

SUMMARY OF ARGUMENT.

Appellants contend that the decree is void as to their water rights situate in New Mexico because (I) the suit in which the decree was entered was an action to quiet title to water rights, (II) because the State of New Mexico is an indispensable party, (III) because the decree attempts to affect the title to water rights in New Mexico of persons who were not parties to this litigation, and (IV) because the decree and the court's order pursuant thereto operate directly upon the Gila River and canals in New Mexico.

Also appellants contend that the court erred in the following particulars: (V) The Court erred in making Finding of Fact No. II (R. p. 131) that the Sunset Ditch Company was a corporation at the time this suit was filed for the reason that the charter of the Sunset Ditch Company had prior to that time been forfeited under the laws of the State of New Mexico; (VI) That the court erred in overruling the motion of Parley P. Jones, R. W. Brooks, and Rachel Jensen to quash process and service of the same upon them in New Mexico; (VII) That the court erred in refusing to permit appellants to prove that the waters of the Gila River claimed to have been diverted and used by appellants in violation of the court's decree and order would not have benefited any Arizona water users, including plaintiff or plaintiff's wards, if it had not been so diverted and used; (VIII) The court erred in refusing to permit appellants to prove that the court's order and decree were physically impossible of enforcement in New Mexico because one-half of the water rights adjudicated by said decree

are now owned and operated by persons who are not parties to this suit; (IX) The court erred in ruling that the burden was on appellants to prove they were not guilty of contempt; (X) That the evidence failed to show that the appellants were guilty of disobedience or resistance to any lawful writ, process, decree or command of the court; (XI) That the fine imposed upon appellants was not supported by proof of items of loss or damage; (XII) That the appellants were found guilty of a refusal to pay the acreage assessment and that, therefore, the only relief the court could have granted petitioner was to imprison appellants until they shall pay the assessments.

ARGUMENT.

I.

THE DECREE IS VOID IN SO FAR AS IT AFFECTS WATER RIGHTS SITUATED IN NEW MEXICO.

Appellants are charged with having violated a decree of the United States District Court for Arizona. The decree undertook to quiet title to appellants' water rights in New Mexico.

Appellants moved the court to vacate the decree in so far as it affects their water rights in New Mexico. (R. p. 188.)

The suit in which the decree was entered was brought to quiet title to water rights in the Gila River in Arizona and New Mexico, including the water rights of these appellants in the latter state.

By the amended complaint, jurisdiction was alleged to depend on the fact that the United States of America was a party. (R. p. 5.)

The defendants are some forty canal or ditch companies and irrigation districts and approximately fifteen hundred municipal corporations, school districts, corporations and persons, residents of Arizona and New Mexico. (Stipulation, R. p. 255.) It was alleged that the defendants claimed rights to divert water from the Gila River as it flows between a line ten miles east of the parallel to the dividing line between Arizona and New Mexico and the confluence of the Salt River with the Gila River in Arizona, excluding the valleys of the San Francisco, San Carlos, San Pedro, and Santa Cruz Rivers. (R. p. 23.) Of the valley of the Gila River so described, approximately ten miles lies in New Mexico and the remainder of approximately one hundred and ninety miles lies in Arizona.

Excerpts from the amended complaint set out in the record at pages 21 to 24, paragraphs 14 and 15, inclusive, clearly show the nature of the suit, and that it was an action to quiet title to water rights. The decree (Appendix p. i) recites that the parties have compromised their claims, as set forth in their pleadings, and this statement is reiterated in the stipulation for the entry of the consent decree. (Appendix—Stipulation.)

This was not a suit in tort to obtain an injunction restraining the defendants from diverting the waters

of the Gila River above plaintiff's lands to its prejudice, and therefore not within *United States v. Walker River Irrigation District* (9 Cir.), 104 Fed. (2d) 334; *Vineyard Land and Stock Company v. Twin Falls S. R. L. & W. Co.* (9 Cir.), 245 Fed. 9; or *Rickey Land and Cattle Company v. Miller and Lux*, 218 U. S. 258, 54 L. ed. 1032, 152 Fed. 11, 146 Fed. 574.

In *Miller and Lux v. Rickey, et al.* (C. C.), 146 Fed. 574-575, characterizing the suit in that case, the court said:

“The general nature and character of this suit may be briefly stated as one in tort to obtain an injunction restraining the defendants from diverting the waters of Walker River above complainant's land to its prejudice.”

An action to quiet title to a water right is a local suit and must be commenced and prosecuted in the courts of the state in which the water right is situated. This court, in *Rickey Land and Cattle Co. v. Miller and Lux*, 152 Fed. 11-14, 15, approved the decision of the Supreme Court of Utah in *Conant v. Deep Creek and Curlew Valley Irrigation Co.*, 66 Pac. 188, 189. The Supreme Court of Utah said (p. 189):

“An action therefore to quiet the title and determine and establish the rights to divert and use water for such purposes is in the nature of an action to quiet title to real estate and must be commenced and prosecuted in the courts of the state in which it is situated. The courts in one state are without jurisdiction to hear and determine suits affecting the title to lands in another state.” Citing cases.

And in that case the court also said:

“The respondents contend that the appellants, having interpleaded in the Idaho case and participated in the trial thereof, are estopped by the force of that adjudication from questioning it. Jurisdiction of the subject matter of a suit cannot be conferred by consent, neither can the want of such jurisdiction be waived.” Citing cases.

In the recent case of *Albion-Idaho Land Co. v. Naf Irrigation Co.*, 97 Fed. (2d) 439 (10th Cir.), the court said:

“A suit to adjudicate water rights is a local action. The Hart decree undertook to adjudicate water rights beyond the jurisdiction of the court and was void on its face.” Citing in support *Conant v. Deep Creek and Curlew Valley Irrigation Co.* and *Rickey L. & C. Co. v. Miller and Lux*, 152 Fed. 11, affirmed 218 U. S. 258, 54 L. ed. 1032.

II.

THE STATE OF NEW MEXICO IS AN INDISPENSABLE PARTY.

The appellants moved the court to vacate the decree and orders pursuant thereto in so far as they affect water rights in New Mexico for the reason that the State of New Mexico is an indispensable party. (R. pp. 188, 189, 190.)

It appears from the record that there were 2456 acres of water rights under the Sunset Canal in the Virden District in New Mexico whose rights were determined by the decree, and that of the present

owners of said water rights fifty per cent are not parties to this suit. (R. p. 184.) It also appears in Firth's petition that seventy-five persons were named as respondents who were defendants and owners of land and water rights described in the decree. (R. 47.) Of these but thirty-two, who are the appellants here, were found to have irrigated land under the Sunset Canal in 1939. (R. p. 145.)

The court was also apprised of the fact that the State of New Mexico had challenged the court's decree and order and had assumed control of the Gila River and the diversion and distribution of its waters in New Mexico.

"The decree was of no force against Oregon or Oregon appropriators not parties to the suit. *United States v. Oregon*, 295 U. S. 1-12; 79 L. ed. 1267-1272; *Priest v. Las Vegas*, 232 U. S. 604; 58 L. ed. 751."

Washington v. Oregon, 297 U. S. 517-528; 80 L. ed. 837, 843.

New Mexico has a paramount right in the waters of the Gila River in New Mexico.

In *New Jersey v. New York*, 283 U. S. 335, 342, 343; 74 L. ed. 1104-1106, the Supreme Court said:

"A river is more than an amenity, it is a treasure. It offers a necessity of life that must be rationed among those who have power over it. New York has the physical power to cut off all the water within its jurisdiction. But clearly the exercise of such a power to the destruction of the interest of lower States could not be tolerated. And on the other hand equally little could New Jersey be

permitted to require New York to give up its power altogether in order that the river might come down to it undiminished. Both States have real and substantial interests in the River that must be reconciled as best they may be."

In *Arizona v. California*, 298 U. S. 558-572; 80 L. ed. 1331-1339, the court said:

"Although no decree rendered in its absence can bind or affect the United States, that fact is not an inducement for this court to decide the rights of the states which are before it by a decree which, because of the absence of the United States, could have no finality."

The rights asserted by the plaintiff in this cause are subordinate to and dependent upon the right of New Mexico to an equitable share of the waters of the Gila River.

New Mexico has asserted its right and challenges the jurisdiction of the District Court of Arizona. The decree lacks finality and any decree of the United States District Court of Arizona in this cause in the absence of New Mexico will lack finality so far as it affects water rights on the Gila River in New Mexico.

It appears from the record that if the decree is enforced the lands and property of not only the defendants but the owners of fifty per cent of the land and water rights who are strangers to the decree will be destroyed.

Not only is the State of New Mexico not a party, but a large part of the owners of land and water rights

affected by the decree are not parties to and are not bound by the decree.

The Supreme Court of the United States in the case of *Wyoming v. Colorado*, 259 U. S. 419, 468, 66 L. ed. 999-1015, said:

“As respects Wyoming the welfare, prosperity, and happiness of the people of the large part of the Laramie Valley, as also a large portion of the taxable resources of two counties, are dependent on the appropriations in that state. Thus the interests of the state are indissolubly linked with the rights of the appropriators.”

The State of New Mexico is an indispensable party for the further reason that the acts necessary to enforce the decree so far as they affect New Mexico water rights must be done in New Mexico and require the assent of New Mexico. It now appears that New Mexico has not given her consent but has prevented the enforcement of the decree by taking over the administration of the waters of the Gila River and ousting the court's water commissioner from further control.

In *Rickey Land and Cattle Company v. Miller and Lux*, 218 U. S. 258-262, 54 L. ed. 1032-1038, the court said:

“The alleged rights of Miller and Lux involve a relation between parcels of land that cannot be brought within the same jurisdiction. This relation depends as well upon the permission of the laws of Nevada as upon the compulsion of the laws of California. It is true that the acts necessary

to enforce it must be done in California and require the assent of that State so far as this court does not decide that they may be demanded as a consequence of whatever right, if any, it may attribute to Nevada.”

Commenting upon this decision, Mr. Wiel in Volume 1, *Water Rights of Western States* (3d ed.) page 364, said:

“In the late case of *Rickey etc. Co. v. Miller*, in the supreme court of the United States, the decision upon a question of procedure below referred to was based upon the principle of *Kansas v. Colorado*, that riparian owners in California or appropriators in Nevada, upon the Walker River crossing the boundary, must deduce any right they may have from the law of their respective States; and the enforcement of either right beyond the boundary of its State must depend upon the concurrence of the other State. Unless the upper State (California) will voluntarily impose conditions upon its citizens in favor of users in the lower State (Nevada), the latter have no right in the matter other than to complain that the lower State as such (and not merely the plaintiff) is not receiving an equitable share of the benefit of the stream. This seems to make rights upon interstate streams a matter of interstate relation, reachable by creation of joint commissions between the States interested, to establish rules for such streams.”

The State of New Mexico is an indispensable party for the further reason that it appears from the record at this time that New Mexico, in taking charge of

the Gila River and the Sunset Ditch, has prevented the enforcement of the court's decree and order.

The court cannot compel these appellants to perform any act necessary to carry out the decree and order of this court because appellants have no power or control over the State of New Mexico, its officers or agents, or any means of compelling them to permit the performance of the court's decree and order.

The case of *Kendig v. Dean*, 97 U. S. 423, 24 L. ed. 1061, is in point here, from which we quote as follows:

“The appellant, who was complainant below, was a citizen of Tennessee where the suit was brought, and Dean, the defendant, was a citizen of Ohio. The controversy related to one hundred and eighty-four shares of the stock of the Memphis Gas-Light Company, which Company was not made a party to the suit. A demurrer to the bill was overruled; and the Court, after hearing on bill, answer, exhibits and depositions, dismissed the bill on the merits.

“We are of opinion that the circuit court had no jurisdiction to try the case, because the gas-light company was an indispensable party to the relief sought in the bill, or to any relief which a court of equity could give.

“The substance of the bill is that plaintiff was the owner of the shares of the gas company stock, already mentioned, and that while he so owned and held the stock, and during the late civil war, the defendant ‘Obtained possession of the books and control of the offices of the company, and being so in possession and control, wrongfully and fraudu-

lently procured and obtained to be made a transfer upon the books of the company to his own name as owner, and from the name of your orator, the said 184 shares of stock, and the issuance to him of a certificate of said stock, and the cancellation of the certificate of his stock belonging to and in the name of your orator.' It is further alleged that this was done without purchase from, or consideration given to, plaintiff, and without any lawful authority.

"The relief prayed is, 'That the said capital stock may be restored to your orator, and deemed to be of his property; and that all the right and title thereto may be divested out of said Dean, and vested in your orator; and that said Dean may be compelled to cause and authorize the transfer of said stock to be made on the books of the company to your orator, and may be enjoined from making or authorizing to be made a transfer of any of the stock to any other person; and that other suitable relief may be granted to your orator.' The original certificate of stock is in possession of plaintiff, as he declares in the bill, and is annexed to it as an exhibit.

"It also appears that the corporation, at the time the suit was brought, had a president, a board of directors and a secretary. This suit is not brought to recover the dividends received by Dean which ought rightfully to have been paid to plaintiff. No such relief is asked, and no averment that any dividends were declared or paid to Dean on that account. Nor is it brought to recover damages for the wrongful seizure of plaintiff's property and conversion of it to defendant's use.

“The relief appropriate to either of these grievances might have been sought in an action at law. It is not an action to obtain from Dean the specific certificate of stock, for that remains in plaintiff’s possession.

“The gravamen of the charge is that Dean, while in possession of the books and control of the offices of the company, caused a transfer to be made on the books of the company to him of the shares of its stock owned by plaintiff, and the relief asked is the restoration of the stock on the books of the company to the name of plaintiff, and the future recognition by the company of his rights in the stock. And the court is asked to compel Dean to do this.

“Suppose that the court had rendered a decree in the exact language asked by plaintiff, and Dean should be attached for contempt in refusing to perform it. He could answer very truly that he was not the gas light company, and had no control of the books or of the officers of the company; that he had no means of compelling the company to make transfer of this or any other stock on its books; that it was a corporation governed by its own officers, and was not bound by the decree of the court, and would not perform it. The court would find itself in the position of having made a decree it could not enforce, of attempting to give a relief which was beyond its power, because the party whose action was necessary to that relief was not a party to the suit.

“On the other hand if the gas-light company had been a party to the suit, and plaintiff had sustained the allegation of his bill by proof, the relief would have been perfect. The company could have

been compelled to restore plaintiff to the ownership of the stock on their books, and to treat him in future as one of their stockholders, and the decree would have bound both Dean and the company. As it is, the specific relief sought by plaintiff is not within the power of the court, nor, is any relief within the equity jurisdiction of the court which can arise out of the frame of the bill in the absence of the gas light company.

“The rules which govern the circuit courts of the United States sitting in chancery, in cases like this, have been well defined in the cases of *Shields v. Barrow*, 17 How., 130, 15 L. ed. 158, and *Barney v. Baltimore*, 6 Wall. 280, 18 L. ed. 825.”

The appellants and owners of water rights acquired by complying with the statutes of the State of New Mexico acquired only the usufruct of the waters of said stream. The basic title and the right to control and dispose of said water remained at all times in the State of New Mexico, subject to the right to use in New Mexico under its laws. The appellants could not by a deed or other conveyance without the consent and against the will of the State of New Mexico sell their water rights to users in Arizona. Nor can they by a consent decree do indirectly what they cannot do directly by conveyance. New Mexico's equitable portion of the waters of the Gila River still remains a natural resource of the State of New Mexico for the benefit of the public. What that equitable portion may be has never been determined by a court of competent jurisdiction.

III.

SUCCESSORS IN TITLE TO DEFENDANTS OWNING WATER
RIGHTS IN NEW MEXICO ARE NOT BOUND BY THE
DECREE.

It appears from the record that one-half of the water rights in New Mexico adjudicated by the decree are now owned by persons who were not parties to the decree. As to them the decree is a nullity.

The Supreme Court in *Rickey Land and Cattle Co. v. Miller & Lux*, 218 U. S. 258-262, 54 L. ed. 1032-1038, states:

“To affect a purchaser with a suit against his vendor, it is said that at least the *res* must be within the territorial jurisdiction of the court in which the suit is brought. See *Fall v. Eastin*, 215 U. S. 1, 54 L. ed. 65, 23 L. R. A. (N. S.) 924, 30 Sup. Ct. Rep. 3.”

In the last mentioned case, *Fall v. Eastin*, supra, the court said (215 U. S. 11):

“But, however plausibly the contrary view may be sustained, we think that the doctrine that the court, not having jurisdiction of the *res*, cannot affect it by its decree, nor by a deed made by a master in accordance with the decree, is firmly established.”

 IV.

THE DECREE AND ORDER OF THE DISTRICT COURT OPERATE
DIRECTLY ON THE RIVER AND CANALS IN NEW MEXICO.

The decree provides that a Water Commissioner shall be appointed by the court to carry out and en-

force the performance of the decree and the instructions and orders of the court, and that if any proper order or direction of the Water Commissioner made for the enforcement of the decree is disobeyed he is empowered to cut off the water from the ditch then being used by the person so disobeying, promptly reporting his action to the court; that the means for securing funds to pay the salary and expenses of the Water Commissioner shall be fixed by the court. (Appendix, pars. XII and XIII.)

By its order of December 9, 1935, the District Court ordered the Water Commissioner to collect from the party designated by the decree as the party entitled to divert under the terms of the decree 13¢ per annum for each acre for which a water right is given by the decree; and the Water Commissioner is ordered and directed to refuse the delivery of water from the Gila River to any party entitled to divert so long as such diverter remains in default in the payment of any of its share of the said 13¢ per acre. (R. p. 59.)

By the decree the rights to divert water from the Gila River are decreed to the various canal companies. The appellants were not decreed rights to divert. (Appendix, pars. V and VIII.)

The evidence shows that the Water Commissioner on January 1, 1939, locked the headgates and notified the Sunset Canal Company to pay the assessment and that until it paid, the water would remain cut off. (R. p. 204.)

All of these acts were done, and by the decree and order required to be done, in the State of New Mexico.

This court in *Vineyard Land and Stock Co. v. Twin Falls S. R. L. & W. Co.*, 245 Fed. 9, said:

“ ‘It (the court) cannot by any decree which it may make in this suit, directly reach the dams, ditches and reservoirs belonging to the defendant located entirely within the State of California.’ *Miller & Lux v. Rickey* (C. C.), 127 Fed. 573-575. In this expression of the law we concur.”

In the case of *Wyoming v. Colorado*, 298 U. S. 573, 80 L. ed. 1339, which was an original suit by the State of Wyoming against the State of Colorado to enforce the decree of the United States Supreme Court in an earlier suit between them respecting their relative rights to divert water from the Laramie River, an interstate stream rising in Colorado and flowing into the State of Wyoming; and the court, having fixed in the former suit the amount of water which it found the State of Colorado was entitled to divert, and Wyoming having complained that Colorado had diverted more than she was entitled to, the court had under consideration the right of the State of Wyoming to install measuring devices on the stream in Colorado, and on this point the court said (298 U. S. 585):

“In the bill it is complained that Colorado, although requested so to do, has refused to permit Wyoming to install measuring devices at the places of diversion for the purpose of ascertaining the amount of water being diverted in Colorado from the river and its tributaries, and there is a prayer for a decretal order permitting such installation. The evidence bearing on this matter hardly can be regarded as establishing the pro-

priety of such an order, and yet it tends to show a need for improving the means and methods of measuring the diversions, for keeping accurate and complete records thereof, and for according to the representatives of Wyoming full access to both the measuring devices and the records. Recognizing this need, Colorado in her brief assures us that through her officers she will accord to Wyoming's officers free access to the measuring devices and to the registering charts, records, and other available data, will co-operate freely with them in devising an appropriate plan for measuring the diversions, and will give full consideration to such suggestions as they may make respecting the improvement of the measuring equipment. In this situation the order which is asked would be inappropriate. While the problem of measuring and recording the diversions is a difficult one, we entertain the hope that the two States will by co-operative efforts accomplish a satisfactory solution of it. But we think Wyoming should have leave to apply to us for an appropriate order in the matter if the two States are unable to agree and it is found that there is real need for invoking action by us."

In that case the Supreme Court of the United States had full jurisdiction to appoint its water master to control the diversion of water in Colorado, but was loathe to do so as long as it was not shown that the two states could not agree upon the installation and operation of measuring devices although the same were necessary to the enforcement of the court's decree.

V.

THE COURT ERRED IN MAKING FINDING OF FACT NO. II (R. p. 131) THAT THE SUNSET DITCH COMPANY WAS A CORPORATION AT THE TIME THE COURT ACQUIRED JURISDICTION IN THIS CAUSE.

The court found:

“II. That the Sunset Ditch Company was, in 1903, duly incorporated under the laws of the State of New Mexico; that thereafter said corporation took possession of and thereafter managed and operated the Sunset Canal; that at the time the court acquired jurisdiction in this cause, said corporation was doing business under the name of ‘Sunset Canal Company’ in the states of Arizona and New Mexico, and ever since has been, and now is, doing business under said name; that during all of said time, the officers, agents and representatives of said corporation have acted for said corporation by using the name ‘Sunset Canal Company’, and still continue so to do; that the Sunset Canal Company is identical with the corporation organized and incorporated in 1903, under the laws of the State of New Mexico under the name of Sunset Ditch Company, and is referred to as a party-defendant herein under both names.”

The court made the following Conclusion of Law:

“3. That at the time of the entry of the decree herein, on the 29th day of June, 1935, the Sunset Canal Company was, ever since has been, and now is, a corporation doing business in the States of Arizona and New Mexico and within the jurisdiction of this court.”

The records of the New Mexico State Corporation Commission show that the Sunset Ditch Company was

dissolved June 14, 1921 (R. p. 219) by virtue of a statute which provides:

“That all private corporations organized under the laws of the Territory of New Mexico which have refused or neglected to file the annual reports required by law in the office of the State Corporation Commission of New Mexico, be and the same are hereby declared to be dissolved, and the State Corporation Commission is hereby authorized and directed to strike the names of all such corporations from its index of live corporations.” Chapter 185, Session Laws of 1921 of New Mexico.

The records also show that there has never been a corporation known as the Sunset Canal Company incorporated in the territory or state of New Mexico. (R. p. 219.)

In *Oklahoma Natural Gas Co. v. Oklahoma*, 273 U. S. 634, the court said:

“There is no specific provision in our rules for the substitution as a party litigant of a successor to a dissolved corporation. It is well settled that at common law and in the Federal jurisdiction a corporation which has been dissolved is as if it did not exist, and the result of the dissolution cannot be distinguished from the death of a natural person in its effect. (Citing cases.) It follows, therefore, that as the death of the natural person abates all pending litigation to which such a person is a party, dissolution of a corporation at common law abates all litigation in which the corporation is appearing either as plaintiff or defendant. To allow actions to continue would be to continue the existence of the corporation *pro hac vice*. But

corporations exist for specific purposes, and only by legislative act, so that if the life of the corporation is to continue even only for litigating purposes it is necessary that there should be some statutory authority for the prolongation. The matter is really not procedural or controlled by the rules of the court in which the litigation pends. It concerns the fundamental law of the corporation enacted by the state which brought the corporation into being.”

The original complaint was filed October 3, 1925, four years after the Sunset Ditch Company had been dissolved. (R. p. 2.) If the Sunset Ditch Company was dead, it could not act either in its own name or in the name of the Sunset Canal Company.

The finding was not that the Sunset Canal Company acted as a corporation, or for itself, but that the Sunset Ditch Company assumed the name of “Sunset Canal Company” and carried on the business of the Sunset Ditch Company under the assumed name.

The court fined the Sunset Canal Company. The court did not fine the Sunset Ditch Company.

The Sunset Canal Company did not appeal. There was no such corporation; it could not appeal. The Sunset Ditch Company could not appeal either in its own name or the name of the Sunset Canal Company.

Neither the finding of fact nor the conclusion of law is supported by the evidence.

VI.

THE COURT ERRED IN OVERRULING THE MOTION OF PARLEY
P. JONES, R. W. BROOKS AND RACHEL JENSEN TO QUASH
PROCESS AND SERVICE UPON THEM IN NEW MEXICO.

The appellants, Parley P. Jones, R. W. Brooks and Rachel Jensen were served in New Mexico with the rule to show cause issued in this case. They were summoned as officers and directors of the Sunset Canal Company, and, appearing specially for the motion only, they moved the court to quash the rule to show cause and service upon them as such officers and directors. This motion was overruled. (R. p. 129.)

In *Robertson v. Railroad Labor Board*, 268 U. S. 619-622, 69 L. ed. 1119-1121, the court said:

“Under the general provisions of law, a United States district court cannot issue process beyond the limits of the district (*Harkness v. Hyde*, 98 U. S. 476, 25 L. ed. 237; *Ex parte Graham*, 3 Wash. C. C. 456, Fed. Cas. No. 5,657); and a defendant in a civil suit can be subjected to its jurisdiction in personam only by service within the district (*Toland v. Sprague*, 12 Pet. 300, 330, 9 L. ed. 1093, 1105). Such was the general rule established by the Judiciary Act of September 24, 1789, Chap. 20, §11, 1 Stat. at L. 73, 79, Comp. Stat. §1033, in accordance with the practice at the common law. *Picquet v. Swan*, 5 Mason 35, 39 et seq., Fed. Cas. No. 11,134. And such has been the general rule ever since. *Munter v. Weil Corset Co.*, 261 U. S. 276, 279, 67 L. ed. 652, 654, 43 Sup. Ct. Rep. 347. No distinction has been drawn between the case where the plaintiff is the government and where he is a private citizen.”

VII.

THE COURT ERRED IN REFUSING TO PERMIT APPELLANTS TO PROVE THAT THE WATER DIVERTED FROM THE GILA RIVER, ALLEGED TO HAVE BEEN DIVERTED IN VIOLATION OF THE DECREE AND ORDER OF THE COURT, WOULD NOT, IF IT HAD NOT BEEN DIVERTED, HAVE BENEFITED ANY WATER USER IN THE STATE OF ARIZONA.

The appellants offered to prove that in the year 1939 the water diverted by the State Engineer and used by the appellants and other water users in the State of New Mexico on the Gila River, and which was placed to beneficial use by them would not and could not have benefited any water users in Arizona, and that had the decree been enforced as interpreted by Mr. Firth, the water master, and as operated by him in former years, the result would have been that all crops and fruit trees of the appellants and other water users under the Gila River would have been destroyed. (R. pp. 171-174.)

In *Albion-Idaho Land Company v. Naf Irrigation Company*, 97 Fed. (2d) 439-444 (10 Cir.), the court said:

“(11) While ordinarily a prior appropriator has a paramount right to divert water from the stream and a junior appropriator may not divert water unless the waters flowing in the stream are in excess of the amount which the prior appropriator has the right to divert, if, due to seepage, evaporation, and channel absorption or other physical conditions beyond the control of the appropriators, the water flowing in the stream will not reach the diversion point of the prior appropriator in sufficient quantity for him to

apply it to beneficial use, then a junior appropriator whose diversion point is higher on the stream may divert the water. The paramount right of the prior appropriator does not justify him in insisting that the water be wasted and lost by denying its use to the junior appropriator under such circumstances.”

Fenstermaker v. Jorgensen, 53 Utah 325, 178

P. 760, 763;

Cleary v. Daniels, 50 Utah 494, 167 P. 820, 833;

Dern v. Tanner (D. C. Mont.), 60 F. (2d) 626, 628;

Washington v. Oregon, 297 U. S. 517, 522, 523, 56 S. Ct. 540, 542, 80 L. ed. 837.

VIII.

THE COURT ERRED IN REFUSING TO PERMIT APPELLANTS TO PROVE THAT THE COURT'S ORDER AND DECREE WERE PHYSICALLY IMPOSSIBLE OF ENFORCEMENT IN NEW MEXICO BECAUSE ONE-HALF OF THE WATER RIGHTS ADJUDICATED BY SAID DECREE ARE NOW OWNED AND OPERATED BY PERSONS WHO ARE NOT PARTIES TO THIS SUIT. (R. pp. 175-176.)

The appellants offered to prove that one-half of the lands and water rights in New Mexico on the Gila River which were described in and title to which was attempted to be adjudicated in this suit have passed into the hands of innocent purchasers who are not now and never have been parties to this decree, and that such lands are all served by one canal which also serves the lands of these appellants, and that it is impossible to divert and distribute the water

of the Gila River through the Sunset Canal to the appellants in compliance with the decree and orders of the court and at the same time permit the persons who are not parties to this suit free access to the waters of the river and the right to divert and use the same according to their New Mexico appropriations, and that when in January, 1939, Mr. Firth cut off the waters of the Gila River from the Sunset Canal and notified the officers of the Sunset Canal Company that the same would not be turned on or diverted until the acreage assessment had been paid, he not only deprived the appellants of water, but also the other water users under the Sunset Canal of water to which they were entitled.

If the decree does not affect title to lands and water rights in New Mexico and is effective only in so far as the court had jurisdiction of the defendants and these appellants, it then follows that the purchasers from defendants are not bound by the decree. The decree as to them in New Mexico until and unless the court acquires jurisdiction over their persons and coerces their obedience to the decree and orders of the court is unenforceable. They are not bound as purchasers of land are bound by actual notice of an outstanding deed or other evidence of title because the decree is not effective as a conveyance or a grant, nor is the decree constructive notice for the same reason.

IX.

THE COURT ERRED IN RULING THAT THE BURDEN OF PROOF WAS UPON THE APPELLANTS TO PROVE THAT THEY WERE NOT GUILTY OF THE CHARGES OF CONTEMPT MADE AGAINST THEM.

The court at the opening of the case at the hearing upon the motion of the District Attorney ruled that the burden was upon the appellants to prove that they were not guilty of contempt, to which ruling an exception was taken. (R. p. 169.)

This court in *Hanley v. Pacific Live Stock Co.*, 234 Fed. 522, 531, said:

“Although it has not been held by the Supreme Court that in a procedure of a civil nature such as the one here before us, the defendant is presumed to be innocent and must be proved to be guilty beyond a reasonable doubt (*Gompers v. Buck’s Stove & Range Co.*, 221 U. S. 418, 444, 31 Sup. Ct. 492, 55 L. ed. 797, 34 L. R. A. (NS) 874), the trend of all the decisions is that the evidence of contempt must be convincing. In *California Paving Co. v. Molitor*, 113 U. S. 609, 618, 5 Sup. Ct. 618, 622 (28 L. ed. 1106), Mr. Justice Bradley said:

“‘Process of contempt is a severe remedy, and should not be resorted to where there is a fair ground of doubt as to the wrongfulness of the defendant’s conduct.’

“In *Accumulator Co. v. Consolidated Electric Storage Co. (CC)*, 53 Fed. 793, in a proceeding for contempt for violation of an injunction, the court said:

“‘This proceeding is criminal in its nature and character, and the same rules should govern as

in the trial of indictments. The burden of proof of establishing violation of the injunction is upon the complainant, and the defendants are entitled to the benefit of any reasonable doubt.'

"So in *General Electric Co. v. McLaren* (CC), 140 Fed. 876, the court held that the burden of proof to establish the violation of an injunction rests upon the complainant, and that the defendant is entitled to the benefit of every reasonable doubt."

Also, see:

17 C. J. S. "Contempt", p. 114—note:

"HEAVY BURDEN RESTS ON PLAINTIFF

"(1) 'The plaintiffs must establish the law and the facts relied on to make out the alleged contempt; but, as this is a proceeding to have the defendant adjudged guilty of a civil contempt, I am not prepared to say that the plaintiffs must establish their case beyond all reasonable doubt * * * But the burden is heavy on the plaintiffs, and where there is reasonable ground to doubt as to the wrongfulness of the conduct of the defendant, it should not be adjudged in contempt.' *Electro-Bleaching Gas Co. v. Paradon Engineering Co.*, D. C. N. Y., 15 Fed. (2d) 854, 855.

"(2) 'The plaintiff has a heavy burden to show a defendant guilty of civil contempt. It must be done by "clear and convincing evidence", and where there is ground to doubt the wrongfulness of the conduct of the defendant, he should not be adjudged in contempt.' *Fox v. Capital Co.*, C. C. A. J. N., 96 F. (2d) 684, 686."

X.

APPELLANTS ARE NOT GUILTY OF DISOBEDIENCE OR RESISTANCE TO ANY LAWFUL WRIT, PROCESS, ORDER, RULE, DECREE OR COMMAND OF THE COURT.

The offense charged against these appellants is that they refused or failed to pay the Water Commissioner 13¢ per acre for the land owned by them, to which a water right had been decreed, and used water from the Gila River without paying the said assessment.

During the hearing the following statements were made by the court and by the United States District Attorney:

“The Court. If I understand the government’s position here, the offense was failing to make their payments on the assessments?

“Mr. Flynn. Yes, your honor.” (R. p. 251.)

The court later stated that he would make a finding (Court’s Finding of Fact No. 15-A, R. p. 141) that the appellants broke or caused to be broken the locks on the headgates of the Sunset Canal (R. p. 251), but as there is no evidence to support this finding we will not notice it further except to call the court’s attention to the fact that the locks and measuring devices were replaced by those installed by the State Engineer of New Mexico (R. p. 54), and there was no complaint that the measuring devices so installed were not efficient or that Firth was denied access thereto.

It is also to be observed that there was no charge that appellants by their use of water deprived any lower appropriator of water which the latter could have beneficially used. This would seem to dispose of

any question of a violation of the injunction granted in the consent decree.

Mr. Wiel, with reference to the effect of an injunction in a like situation, made the following comment:

“The modern rule is to regard injunctions granted to appropriators as based strictly upon beneficial use and as not restraining a defendant while the plaintiff is not himself using the water, even if the decree does not (as it should) expressly so declare; * * *” Citing cases. 1 Wiel, Water Rights in the Western States, p. 708.

The sound reason behind this rule is stated by this court in *United States v. Walker River Irrigation District* (9 Cir.), 104 Fed. (2d) 334-340:

“So precious is every miner’s inch of water in these parched regions that no arrangement should be countenanced which would encourage waste or tend to induce it.”

That the appellants made use of the water to save their crops is not questioned. It is not shown that any lower appropriator within the protection of the injunction could have applied the water to beneficial use.

This proceeding was instituted for the sole purpose of vindicating petitioner Firth’s right to collect 13¢ per acre from appellants.

Neither the decree nor the order fixing the acreage assessment makes it the duty of the appellants to pay Firth 13¢ per acre. That part of the order providing

for the payment of the acreage assessment reads as follows:

“It Is Further Ordered that all expenses of the Water Commissioner herein authorized shall be paid by the land owners and for that purpose the Water Commissioner is authorized and directed to collect 13¢ for each acre of land for which a water right is given in the decree. The Water Commissioner is further directed to collect said 13¢ per acre from each individual, corporation, or party designated in the decree as the party entitled to divert water from the Gila River under the terms thereof * * *”

Nowhere in the order were the appellants commanded to pay Firth 13¢ per acre. That this was Firth's interpretation of the order is evidence by the fact that he made no demand on appellants to pay the assessment but did make a demand on the Sunset Canal Company. (Finding No. XIV, R. pp. 140, 204.)

The order directed Water Commissioner “to collect said 13¢ per acre from each individual, corporation or party entitled to divert water from the Gila River under the term of” the decree. (R. p. 135.) The appellants were not entitled to divert water from the Gila River under the terms of the decree. The Sunset Canal Company was.

It was further provided by the order that “the Water Commissioner is ordered and directed to refuse delivery of water from the Gila River to any party entitled to divert so long as such diverter re-

mains in default in the payment of any of its share of the said 13 cents per acre". (R. p. 136.)

There was no express order commanding appellants to pay the 13 cents per acre assessment nor to refrain from using the water of the river as long as the assessment remained unpaid.

We call the court's attention to the following authorities:

In the case of *In re Probst* (2d Cir.), 205 Fed. 512-513, the court said:

"Our attention has been called to no writ, process, order, rule, decree, or command of the court which he has disobeyed. * * * This may be a highly technical ruling; but where Congress has been so industrious to restrict the natural inherent powers of a federal court, scrupulous attention to the limitations it has imposed would seem to be the proper course."

The same court in *Berry v. Midtown* (2d Cir.), 104 Fed. (2d) 107-111, said:

"Before a person should be subject to punishment for violating a command of the court, the order should inform him in definite terms as to the duties thereby imposed upon him. Once we adopt the principle that an express order to one party carries implications of duties imposed upon the other, it would be difficult to set limits upon the doctrine. We believe it is a wiser policy to punish as contempt only the disobedience of some express command; and such we understand to be the general rule."

Quoting from *Probst* case, *supra*, the court in *Morgan v. United States* (8th Cir.), 95 Fed. (2d) 830-836, said:

“That we are in accord with the quoted declaration of the court, as to our duty to pay scrupulous attention to the limitation imposed by Congress upon the power of the court to punish for contempt, appears from the following expression of this court in *Wilson v. United States*, 8 Cir. 25 F. (2d) 215, 218: ‘Section 385 is a limitation on the power of the inferior federal courts to punish for contempt, *Ex parte Robinson*, 19 Wall. 505, 22 L. ed. 205; and the power must be exercised within the restrictions therein named’.”

If this court should be of the opinion that the order laid an express command upon appellants to pay Firth 13 cents per acre or until the assessments were paid, they were enjoined from using water and that appellants have violated said order or orders then we respectfully submit that the court was without jurisdiction to levy the assessments.

If the court had no power to control the canal, its headgates and measuring devices, through the agency of its Water Commissioner, then it follows that the court could not require appellants to pay Firth for his services in acting as the court's officer or agent for that purpose.

In *Vineyard Land and Stock Company v. Twin Falls S. R. L. & W. Co.*, 245 Fed. 9-29, this court said:

“(16) It is furthermore necessary, to protect the plaintiffs against the encroachments of de-

fendant, that the water be measured. The proper measurement is a duty personal to the defendant. It was altogether appropriate, therefore, that the court impose upon the defendant the obligation of installing automatic measuring devices, and, for the protection of the plaintiffs, these should be subject to their inspection. So it is respecting rules regulating the manner of diverting, measuring, and distributing the water and the keeping of records of the amount of water diverted, etc. These were all directions of the court operating in personam, and not directly upon the res, and were and are within the court's equitable jurisdiction to determine and declare."

XI.

THE FINE IMPOSED OF \$100.00 EACH ON THE APPELLANTS IS FOR A ROUND SUM OF MONEY, NOT BASED UPON ANY PROVED ITEM OR ITEMS OF EXPENSE, BUT INTENDED TO COVER IN PART PROBABLE LOSSES AND EXPENSE, AND IS ARBITRARY, ARRIVED AT BY CONJECTURE, AND THAT SAID FINE IS PUNITIVE AND NOT REMEDIAL.

The court having announced his judgment (R. p. 245) that he proposed to fine the appellants \$100.00 each, and before the entry of the judgment (R. p. 245) counsel for appellants objected for the reason that the said fine is for a round sum of money, not based upon any proved items of loss or expense and intended to cover probable losses and expenses, and that it is not confined to the actual loss to the petitioner incurred by violation of the injunction, including the expenses of the proceedings necessitated by

presenting the offense to the court, but that said sum is arbitrary and arrived at by conjecture.

Appellants rely upon *Christensen Engineering Co. v. Westinghouse Air Brake Co.* (2 Cir.), 135 Fed. 774-782, in which the court said:

“It will thus be seen that the practice has not been uniform, and that in some of the adjudged cases the award, like that in the present case, was for a round sum, not based upon any proved items of loss or expense, but apparently intended to cover probable loss and expenses. It is obvious that a fine exceeding the indemnity to which the complainant is entitled is purely punitive, and, notwithstanding the foregoing precedents to the contrary, we think that when it is imposed by way of indemnity to the aggrieved party it should not exceed his actual loss incurred by the violation of the injunction, including the expenses of the proceedings necessitated in presenting the offense for the judgment of the court. We are also of the opinion that when the fine is not limited to the taxable costs it should not exceed in amount the loss and expenses established by the evidence before the court. Unless it is based upon evidence showing the amount of the loss and expenses, the amount must necessarily be arrived at by conjecture, and in this sense it would be merely an arbitrary decision. Another reason why it should be based upon evidence is that otherwise the question of its reasonableness cannot be re-examined upon an appeal from a final decree in the cause, and the appellate court would have to treat the fine as a purely arbitrary one, or deny to the appellant his right of review.

“The orders under review did not proceed upon any estimate of the actual loss or expenses which the complainant had incurred made from the evidence before the court, and for this reason we think they were erroneous. It may be that the sum directed to be paid to the complainant in the first proceeding was not excessive in amount, but whether it was or was not, and how much of it was intended to cover the expenses of the proceeding, and how much the loss directly suffered by the violation of the injunction, can only be conjectured.”

Quoted with approval in *Norstrom v. Wahl* (6 Cir.), 41 Fed. (2d) 910-913. Followed in *Catalin Corporation of America v. Slosse*, D. C. N. Y., 31 Fed. Supp. 89 (1940).

In view of the present state of the record and the fact that the government of the United States is an interested party here, we do not believe that the court will assume that the petitioner Firth has paid or obligated himself to pay attorneys' fees.

XII.

IF FAILURE TO PAY THE THIRTEEN CENTS PER ACRE CONSTITUTES CONTEMPT, THE ONLY RELIEF THE TRIAL COURT COULD HAVE GRANTED THE PETITIONER WAS TO IMPRISON THE RESPONDENTS UNTIL THEY HAD PAID SAID THIRTEEN CENTS PER ACRE.

The court held that the charge against appellants was their failure to pay the assessments. (R. p. 251.)

This was a refusal to do an affirmative act required by the court's decree and ordered to be done by them.

This was not an act done in disobedience of the court's decree or order. They are charged with having refused to do that which they were commanded to do.

In *Gompers v. Buck's Stove and Range Co.*, 221 U. S. 418, 452, 55 L. ed. 797-810, the court said:

"The distinction between refusing to do an act commanded (remedied by imprisonment until the party performs the required act), and doing an act forbidden (punished by imprisonment for a definite term), is sound in principle, and generally, if not universally, affords a test by which to determine the character of the punishment.

"In this case the alleged contempt did not consist in the defendant's refusing to do any affirmative act required, but rather in doing that which had been prohibited. The only possible remedial relief for such disobedience would have been to impose a fine for the use of complainant, measured in some degree by the pecuniary injury caused by the act of disobedience."

And the court said in the same case (221 U. S. 442, 55 L. ed. 806):

"But imprisonment for civil contempt is ordered where the defendant has refused to do an affirmative act required by the provisions of an order which, either in form or substance, was mandatory in its character. Imprisonment in such cases is not inflicted as a punishment, but is intended to be remedial by coercing the defendant to do

what he had refused to do. The decree in such cases is that the defendant stand committed unless and until he performs the affirmative act required by the court's order."

CONCLUSION.

The judgment should be reversed with instructions to the lower court to set aside its judgment and either vacate the consent decree as to these appellants or dismiss the petition in the contempt proceedings.

Dated, Albuquerque, New Mexico,
August 12, 1940.

Respectfully submitted,

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Of Counsel.

(Appendix Follows.)

Appendix.

Appendix

DECREE.

This cause came on to be heard at this term, and thereupon it was shown to the court:

That the plaintiff and the parties defendant whose claims and rights have been presented by answer or stipulation and remain for determination herein, have concluded and settled all issues in this cause as between plaintiff and said parties defendant, and as between said defendants and each of them and every other thereof, and mutually have agreed—all as evidenced, for plaintiff, by the assenting signatures, endorsed at the end hereof, of its solicitors of record and the Attorney General and Secretary of the Interior of the United States, and for said defendants, by the assenting signatures, likewise endorsed at the end hereof personally, or of their several solicitors of record—that such settlement should be embodied in and confirmed and made effective by way of the within decree of the Court in this cause, defining and adjudicating their claims and rights as against each other in identical form and substance as hereinafter set forth; and the Court upon consideration thereof and of the record herein as to the disposal of the parties defendant who have been separated from the cause, and being duly informed in said premises, doth find, order, adjudge, and declare its decree herein to be as follows, namely: * * *

V.

* * * that rights to divert the waters of the Gila River are decreed to the various canal companies and are set down under their names in the Priority Schedule as of various dates of priority; that the description in each instance of the lands through the irrigation of which said rights were acquired by appropriation and beneficial use and the names of the landowners or their successors in interest, made formal parties defendant herein (and set down under the heading "PARTIES OWNING SAID LANDS WHEN JURISDICTION ACQUIRED HEREIN"), whose beneficial application of water to said lands supported said appropriations are also listed under the names of each of said canal companies, the amounts of water in acre feet per season, with the maximum rates of diversion, allowed for the irrigation of the various subdivisions of said lands being given in the so-called individual columns under the general heading "Diversion Right" in said Priority Schedule; all to the end that the diversion rights of said canal companies may be adequately defined, and the individual rights of said defendant landowners to maintain, arrange or contract for, under applicable statutes and provisions of law, the diversion and carriage of water from the stream to said lands under and in accord with said rights may be identified and preserved; that the irrigation season referred to in this Article of the Decree, which shall as well apply to all rights adjudicated herein, is hereby defined as and determined to be the period beginning on January 1st of each year and

ending on December 31st of the same year; that the Schedule above referred to and made part hereof is as follows:

* * * * *

VIII.

That the diversions of water from the Gila River by the so-called upper valleys defendants (parties defendant to whom rights to divert water from the Gila River at points above the San Carlos Reservoir are decreed herein), comprising the defendant canal companies named below, with the parties defendant named in the Priority Schedule and attached tables who are decreed rights through the canals of said companies and are served thereunder, and certain individual parties defendant who are accredited with rights to divert directly from the stream through private ditches, to-wit:

Albert Canal Company, Billingsley Extension Canal Company, Black & McCleskey Canal Company, Brown Canal Company, Colmenero Canal Company, Colvin-Jones Canal Company, Cospers & Windham Canal Company, Cospers & Windham Extension Canal Company (Under contract whereby Cospers & Windham Canal Company makes actual diversion), Curtis Canal Company, Dodge-Nevada Canal Company, Duncan Canal Company, Fort Thomas Consolidated Canal Company, Fourness Canal Company, Graham Canal Company, Moddle Canal Company, Montezuma Canal Company, San Jose Canal Company, Sexton Canal Company, Shriver Ditch Company, Smithville Canal Company, Sunflower Canal Company, Sunset Canal

Company, Tidwell Canal Company, Union Canal Company, Valley Canal Company, York Canal Company, York Cattle Company;

R. H. Angle, J. H. Brown, T. D. Burton, W. C. Craufurd, J. W. Foote, R. C. Gilleland, J. H. Henderson, C. C. Hester, F. E. Ross, R. Sexton, Laura Short;

* * *

XII.

That a Water Commissioner shall be appointed by this Court to carry out and enforce the provisions of this decree, and the instructions and orders of the Court, and if any proper orders, rules or directions of such Water Commissioner, made in accordance with and for the enforcement of this decree, are disobeyed or disregarded he is hereby empowered and authorized to cut off the water from the ditch then being used by the person so disobeying or disregarding such proper orders, rules or directions; promptly reporting to the Court his said action in such case and the circumstances connected therewith and leading thereto; that whenever the necessities of the situation appear to the Court so to require, the Court shall authorize the employment by the Water Commissioner of such person or persons to assist that officer as to the Court may seem necessary to carry out properly the provisions of this decree and the orders of the Court; that the term of employment, expenses and compensation of said Water Commissioner and his assistants, the payment thereof and the means and methods for securing funds with which to pay the same, shall be fixed by orders which the Court may hereafter from time to

time make; that any person, feeling aggrieved by any action or order of the Water Commissioner, in writing and under oath, may complain to the Court, after service of a copy of such complaint on the Water Commissioner, and the Court shall promptly review such action or order and make such order as may be proper in the premises; that the owner or owners of each ditch or canal herein authorized to divert water from the natural flow of the Gila River for direct conveyance to and irrigation of lands, unless specifically excused by the Court or Water Commissioner, shall at his own expense install and at all times maintain at any appropriate place at or near the head of said ditch, a reliable and readily operated regulating head-gate and a measuring box, flume or other device which may be locked and set in position—the same to be approved by the Water Commissioner—so that the water diverted into said ditch or canal at any and all times may be regulated and measured; that upon failure of any owner or owners to install structures of the above described character on or before one year from the date of this decree or on or before such different day as the Court or Water Commissioner shall set or determine—after due notice from the Water Commissioner so to do—the said Water Commissioner is herein authorized to cut off diversions of water into said ditch or canal until such devices and structures shall be installed and maintained.

XIII.

That each and all of the parties to whom rights to water are decreed in this cause (and the persons,

estates, interests and ownerships represented by such thereof as are sued in a representative capacity herein), their assigns and successors in interest, servants, agents, attorneys and all persons claiming by, through or under them and their successors, are hereby forever enjoined and restrained from asserting or claiming—as against any of the parties herein, their assigns or successors, or their rights as decreed herein—any right, title or interest in or to the waters of the Gila River, or any thereof, except the rights specified, determined and allowed by this decree, and each and all thereof are hereby perpetually restrained and enjoined from diverting, taking or interfering in any way with the waters of the Gila River or any part thereof, so as in any manner to prevent or interfere with the diversion, use or enjoyment of said waters of the Gila River or any part thereof, so as in any manner to prevent or interfere with the diversion, use or enjoyment of said waters by the owners of prior or superior rights therein as defined and established by this Decree; that nothing herein shall prejudice the rights of any of the parties hereto or of their grantees, assigns or successors in interest, under any transfer or legal succession in interest after the commencement of this action, to any of the rights hereby adjudicated; that except as hereinbefore mentioned or otherwise stated, the provisions of this Decree shall bind, and inure to the benefit of, the grantees, assigns and successors in interest of the owners of rights and parties hereto, whether substituted as parties or appearing in this case or named herein or not; that the

several parties to this suit shall pay their own costs in this action as directly incurred or authorized by them respectively, provided that any compensation of the Water Commissioner, or amounts shown to be coming to him or the reporter, if any there be, shall be paid in such manner, at such times and by such parties as may be ordered by the Court; that the Court retains jurisdiction hereof for the limited purpose above described, this decree otherwise being deemed a final determination of the issues in this cause and of the rights herein defined.

Done in Open Court this twenty-ninth day of June, 1935.

Albert M. Sames,
Judge.

STIPULATION FOR AND CONSENT TO THE ENTRY OF A
FINAL DECREE IN THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF ARIZONA IN THE CASE
OF UNITED STATES OF AMERICA, v. GILA VALLEY
IRRIGATION DISTRICT, ET AL.

Come now the parties hereto, either in person or by their solicitors, and inform the Court that they have reached a settlement of the issues in this cause and have adjusted and settled their respective claims as between each other; that they have set up in the within and foregoing decree the respective rights of all parties hereto, and request the Court to adopt said decree as its finding herein and that it be entered as its final decree in this cause, settling and adjudicating the rights of the parties hereto. * * *

7
No. 9544

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

R. W. BROOKS ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA AND C. A. FIRTH, APPELLEES

**UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF ARIZONA**

BRIEF FOR THE APPELLEES

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FILED

SEP 26 1940

PAUL P. O'BRIEN,

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**In the United States Circuit Court of Appeals
for the Ninth Circuit**

No. 9544

R. W. BROOKS ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA AND C. A. FIRTH, APPELLEES

*UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF ARIZONA*

BRIEF FOR THE APPELLEES

OPINION BELOW

The district court wrote no opinion. Its findings of fact and conclusions of law are to be found at pages 129-144 of the record.

JURISDICTION

This is an appeal from a final judgment of the District Court of the United States for the District of Arizona entered on March 11, 1940 (R. 145), adjudging appellants guilty of contempt for the violation of a final decree of said court entered June 29, 1935, and an order of said court pursuant to said decree entered December 9, 1935 (R. 133), in a cause pending in said court entitled "United States of America, plaintiff v. Gila Val-

ley Irrigation District, et al., defendants," and numbered Globe-Equity No. 59. The jurisdiction of the district court was originally invoked under section 24 (1) of the Judicial Code, as amended, 28 U. S. C., sec. 41 (1) (R. 5). The district court retained jurisdiction to administer the decree (R. II, pp. 112-113; Br. App. p. vii).* The present contempt proceedings were instituted pursuant to those provisions of the decree. The jurisdiction of this Court is invoked under section 128 of the Judicial Code, as amended, 28 U. S. C., sec. 225 (a).

QUESTIONS PRESENTED

1. Whether the federal court in Arizona, in a suit brought by the United States to have its direct diversion and storage rights in the waters of the Gila River judicially determined and protected as against other diverters in Arizona and New Mexico (who personally appeared and asked for cross relief), had jurisdiction to inquire into and determine the rights of New Mexico water users so as to prevent them from encroaching on the rights of the United States and the other diverters in Arizona.

2. Whether, in order to prevent the New Mexico defendants from diverting water to the prejudice of the

*The 1935 decree, and the annual reports of Water Commissioner Firth to the district court for the years 1936-1938, which are part of the record, have not been printed as part of the transcript. However, copies of the decree prepared by the Government Printing Office have been filed with the Clerk as Volume II, and mimeographed copies of the reports as Volumes III, IV and V of the transcript (R. pp. iii, 283). References herein will be to the printed or mimeographed copies (R. II, III, IV, V) and also to excerpts from these volumes which have been set out in the appendix to appellants' brief (Br. Appendix) and the appendix to this brief (*infra*, pp. 69-75). All record citations herein are to Volume I unless otherwise indicated.

downstream users in Arizona, the court had jurisdiction (a) to order the New Mexico diverters to install and maintain locks and measuring devices on their headgates in New Mexico, and (b) to appoint a water commissioner to see that the provisions of the decree were respected by water users in both states.

3. Whether the State of New Mexico was an indispensable party to the suit.

4. Whether an adjudication of the water rights of the New Mexico defendants, when made by the Arizona court for the purpose of protecting direct diversion and storage rights of water users in Arizona, is binding on successors in interest in New Mexico, on the theory (a) that an injunction may be made to bind successors in interest, or on the theory (b) that all New Mexico water users under the Sunset Canal are bound by the provisions of the decree against the Sunset Canal Company.

5. Whether the federal court in Arizona, in a contempt proceeding brought to enforce the aforesaid decree, erred in overruling a motion by certain New Mexico defendants to quash the service made on them in New Mexico as officials of the Sunset Canal Company.

6. Whether the court's judgment that the appellants have disobeyed the decree and subsequent orders of the court and the water commissioner is supported by admissions in the pleadings and by the evidence.

7. Whether the court erred in placing on the appellants "the burden of going forward" with the evidence.

8. Whether the court properly rejected appellants' offer to prove that the diversion of water in New Mexico did not injure the water users in Arizona.

9. Whether the court abused its discretion in imposing a \$100.00 fine on each of the appellants rather than in imprisoning them.

STATEMENT

The present contempt proceedings grow out of violation of a decree entered in a suit brought by the Government in 1925 to have its water rights in the Gila River judicially determined.

The Gila River rises in New Mexico and flows in a westerly direction across Arizona. It runs through the San Carlos, Apache, and Gila River Indian Reservations and joins the Colorado River at Yuma (map, R. III, plate 1, following p. 17). The waters of this stream were used by the Indians for irrigation purposes long before the arrival of the white man (R. 6). The early pioneers put the water to a similar use (R. 10). With the increased development of irrigation the question of water priorities became one of great importance.

As early as 1910, the federal Government began an investigation of the situation with a view to protecting the rights of the Pima and other Indians residing on the Gila River Indian Reservation in central Arizona. In 1916 Congress passed legislation which made it possible to effect a partial adjustment of priority claims in that area: it authorized the construction of the Florence-Casa Grande Project for the irrigation of white- and Indian-owned lands in central Arizona, but only on condition that the diversion rights of the interested parties should be satisfactorily adjusted, either by agreement or by court action.¹ The resulting agreement (R. 15-17),

¹ Act of May 18, 1916, c. 125, 39 Stat. 123, 130-131.

while effective as between the parties, did not include water users under other projects further upstream, and these upstream diversions rendered the available water supply inadequate to irrigate the lands in central Arizona.

Therefore, in order to provide additional facilities, Congress in 1924 authorized the construction of the Coolidge Dam and Reservoir, as a part of the San Carlos Project, to impound water for the supplemental irrigation of the Gila River Indian Reservation lands.² It was apparent, however, even at the time that this act was passed, that the requirements of irrigable lands along the Gila River exceeded the amount of water normally available for direct diversion. There were, in addition to the 100,000 acres in the San Carlos Project, some 3,000 acres of Indian land at Gila Crossing further downstream, and some 42,000 acres upstream [1,300 acres in the Winkelman Valley, 1,000 acres in the San Carlos Reservation, 32,000 acres in the Safford Valley, and 8,000 acres in the Duncan-Virden Valley] (Map R. III, plate 1). Since the San Carlos Project was located comparatively far downstream, the Government realized that the construction of this costly project would not insure an adequate supply of water for the Gila River Indian Reservation unless the upstream diversions were carefully regulated. To that end the United States in 1925 instituted a suit in the federal district court in Arizona to have its water rights in the Gila River judicially determined (R. 2-25).

² Act of June 7, 1924, c. 288, 43 Stat. 475.

In its bill the United States, on behalf of itself and the Pima and Apache Indians, claimed water rights as of various dates: some rights were based on immemorial appropriation by the Indians; other rights were based on the doctrine of the *Winters* case, 207 U. S. 564 (1908); and still other rights were based on subsequent appropriations and purchases (R. 6-23). The Government also claimed a separate right to store waters in the San Carlos Reservoir (R. 21, 23).

Approximately 2,000 persons, individual and corporate, who claimed some right to divert, appropriate, or use the waters of the Gila River, whether in Arizona or New Mexico, were named as parties defendant (R. 4). But the large canal companies which made the actual diversions and supplied water to the individual users in the several districts were the primary defendants. This fact is illustrated by the form of the complaint, the name of the canal company being listed first and separated by a colon from the names of the individual stockholders (water users) of that particular canal, e. g., "Sunset Canal Company: Florentino Billaba, C. M. Brooks, R. W. Brooks [etc.]" (R. 3-4).

The bill alleged that the defendants' claims were in conflict with and adverse to the rights of the United States, and if exercised would so diminish the volume of water in the river as to deprive the United States of its prior rights (R. 24); and that the Government's rights could not be properly ascertained or protected until the rights of all parties were "judicially determined" (R. 24). It was, therefore, prayed that the court, by its decree, "determine" the rights of the par-

ties to the waters of the Gila River and its tributaries, and that "the Court decree to the United States the water rights hereinabove set forth as owned and claimed by the United States, and *quiet its title* therein, and *enjoin said defendants* and each of them from interfering therewith" (R. 25).³

The suit was particularly complex for several reasons. In the first place many diverters claimed a certain quantity of water as of one date and an additional amount as of a later date. The value of the later appropriations depended on the available water supply and intervening appropriations made by other claimants. In the second place the dates of individual appropriations within each valley varied considerably, so that it could not be said that the demands of any particular valley as a unit had to be satisfied first. Besides these practical difficulties (generally present in water controversies involving rights in large rivers), there was also a jurisdictional problem caused by the fact that a small part of the Duncan-Virden Valley extends eastwardly across the state line into New Mexico, placing within the latter state approximately 2,800 of the 143,000 acres involved in the litigation. Water for approximately all of these 2,800 acres is diverted by the Sunset Canal Company, a primary defendant, which also carries water into Arizona (R. 3).

Francis C. Wilson (the New Mexico water commissioner) seems to have agreed that the suit should be brought in Arizona, and acted as counsel for the New Mexico defendants (R. 26-28). The several defendants, those in New Mexico as well as those in Arizona, entered

³ Italics are ours throughout this brief.

a general appearance, either in person or through their counsel. They answered the Government's complaint, and by way of cross-relief asked that their rights be ascertained as against the United States and as among themselves (R. 29-44).

Because of the number of parties involved and the quantity of evidence heard, the litigation continued for a period of ten years. Finally in 1935, on the basis of evidence then available, the parties "adjusted and settled their respective claims as between each other," signed a "stipulation for and consent to the entry of a final decree," and asked the court to adopt as its findings and to enter as its decree the stipulation which set forth "the respective rights of all parties (R. II, p. 1 following decree; Br. Appx. p. vii). The court, pursuant to this stipulation, entered its decree on June 29, 1935, and retained jurisdiction to enforce and implement its decree (R. II, 112, 113; Br. Appx. iv-vii).

The decree describes in detail the nature and extent of the rights owned by each party and the land upon which the water may be used (Art. V, R. II, 12-105; Br. Appx. ii); provides for the appointment of a water commissioner to carry out and enforce its provisions, with power to cut off water from the ditches of persons who disobey his orders; requires each diverter to install and maintain measuring and locking devices (Art. XII, R. II, 112; Br. Appx. iv-v); enjoins all parties, their assigns, successors in interest, servants, agents, attorneys and all persons claiming by, through or under them and their successors, from asserting or claiming, as against the parties, any right, title or interest, except the rights determined and allowed in the decree; perpetually enjoins each from diverting, taking or interfer-

ing with the waters of the river so as to prevent or interfere with the diversion or use by other parties as provided in the decree; and provides that the decree shall inure to the benefit of grantees, assigns, and successors in interest of the owners of rights and the parties to the decree (Art. XIII, R. II, 113; Br. Appx. v-vii).

After the entry of the decree the court appointed C. A. Firth as water commissioner and, on December 9, 1935, directed that an annual assessment of 13¢ per acre be collected from each water user to meet the expenses of administering the decree (R. 58). No water was to be delivered "to any party entitled to divert so long as such diverter remains in default in the payment of any of its share of the said 13¢ per acre" (R. 59). The commissioner was also ordered and directed to have each party entitled to divert water install, at his or its own expense, adequate and substantial headgates with adequate locking facilities and accurate measuring and automatic recording devices on or before March 1, 1936 (R. 59).

These orders were complied with by the New Mexico as well as the Arizona defendants (R. 138). During the next three years—from January 1, 1936, to January 1, 1939—the waters of the Gila River were apportioned in conformity with the provisions of the 1935 decree and subsequent orders of the court (R. 138-140). During this period the Sunset Canal Company collected the 13¢ assessment from all water users under its system, those in New Mexico as well as those in Arizona (R. 138-139).⁴

⁴ Approximately 95% of the water which is diverted from the Gila River and which is used on lands of the New Mexico defendants passes through the canals of the Sunset Canal Company.

But in the fall of 1938 certain water users in New Mexico, and particularly the officers of the Sunset Canal Company, became dissatisfied with the 1935 decree and appealed to the Interstate Streams Commission of New Mexico for relief from its provisions (R. 223-225). That Commission, after an *ex parte* investigation, decided that the decree was inequitable and void, and instructed the New Mexico State Engineer to take over the administration of the waters of the Gila River (R. 95-97). Acting pursuant to these instructions and asserting that the Arizona court was without jurisdiction, the state engineer purported to establish a water district and appointed a water master to supervise the distribution of the waters of the Gila River among water users in New Mexico (R. 92-93).

The Sunset Canal Company thereupon refused to pay the 13¢ assessment for the coming year (R. 140). Being in default and his demand having been refused, Water Commissioner Firth, on January 1, 1939, locked the headgates of the Sunset Canal Company and refused to deliver any water until the assessments were paid (R. 140).

The Governor of New Mexico, stating that the administration of the river by C. A. Firth was unlawful and an invasion of the sovereign proprietary interests of New Mexico, countered with an order directing the Chief of the State Police to cause Firth to desist from administering the waters of the stream, and put McClure, the State Engineer, in full possession of the facilities for administering the stream (R. 94-95). Firth was requested to hand over the keys to the headgates and other devices, but he refused. The police

officer, on January 4, 1939, cut off the locks and opened the headgate (R. 141, 218). Thereafter the waters were diverted and used by the appellants without regard for the 1935 decree (R. 141-142, 215).

It having become apparent that the New Mexico water users no longer intended to abide by the 1935 decree, Water Commissioner Firth and the United States Attorney for the District of Arizona asked the court below to issue a rule directing the present appellants and certain other New Mexico water users, who were parties to the 1935 decree, to show cause why they should not be adjudged in contempt of court (R. 46-62). The rule was issued (R. 64), responses were filed (R. 77, 99), and evidence was taken (R. 167-278). On February 6, 1940, the district court found that the respondents had violated the terms of the decree and orders of the court and that they were in contempt (R. 108-109). On March 11, 1940, a judgment was entered adjudging the Sunset Canal Company and the present appellants guilty of contempt and fining each of them \$100.00 (R. 145-146).

SUMMARY OF ARGUMENT

I

A. That a court has jurisdiction to prevent a defendant from committing acts outside the state which encroach upon rights within the state is well established. *Salton Sea Cases*, 172 Fed. 792 (C. C. A. 9, 1909), certiorari denied 215 U. S. 603; *New Jersey v. New York City*, 283 U. S. 473, 482 (1931); *Great Falls Manufacturing Co. v. Worster*, 23 N. H. 462

(1851). The mere fact that the injunction may affect one's rights in, or use of, real property in another state does not deprive the court of jurisdiction. *Massie v. Watts*, 6 Cranch 148 (1810); *Western Union Telegraph Co. v. Louisville & N. R. Co.*, 201 Fed. 946 (W. D. Ky. 1913), aff'd 207 Fed. 1 (C. C. A. 6, 1913). It therefore follows that the federal court in Arizona, in a suit brought by the United States to have its direct diversion and storage rights in the waters of the Gila River judicially determined and protected as against other diverters in Arizona and New Mexico (who personally appeared and asked for cross relief), had jurisdiction to inquire into and determine the rights of New Mexico water users so as to prevent them from encroaching upon the rights of the United States and the other diverters in Arizona. *Miller & Lux v. Rickey*, 127 Fed. 573 (C. C. Nev. 1904), 146 Fed. 574 (C. C. Nev. 1906); *Rickey Land & Cattle Co. v. Miller & Lux*, 152 Fed. 11 (C. C. A. 9, 1907), 218 U. S. 258 (1910); *Vineyard Land & Stock Co. v. Twin Falls, S. R. L. & W. Co.*, 255 Fed. 9 (C. C. A. 9, 1917); *United States v. Walker River Irr. Dist.*, 11 F. Supp. 158, 162 (Nev. 1935); *Willey v. Decker*, 11 Wyo. 496, 73 Pac. 210 (1903); *Taylor v. Hulett*, 15 Idaho 265, 97 Pac. 37 (1908).

The very nature of the subject matter, especially where storage rights are involved, renders it impossible to decide whether rights of diverters in Arizona are being encroached upon without first determining the rights of the New Mexico defendants. And diversion rights in Arizona cannot be adequately pro-

tected except by an injunction restraining the New Mexico defendants from taking water in excess of their lawful rights. Therefore, while the injunction indirectly determines the water rights of users in New Mexico, the whole purpose of the decree is to protect rights within the State of Arizona, a matter which is admittedly within the jurisdiction of the federal court of that state. Any decree less broad would not protect direct diversion and storage rights of the water users in Arizona.

B. The court also had jurisdiction to that same end to require locks and measuring devices to be installed in New Mexico and to appoint a water commissioner to carry out the provisions of the decree. *Vineyard Land & Stock Co. v. Twin Falls S. R. L. & W. Co.*, 245 Fed. 9, 27-29 (1917); *Salton Sea Cases*, 172 Fed. 792 (C. C. A. 9, 1909), certiorari denied 215 U. S. 603.

C. The State of New Mexico was not an indispensable party to the decree. A court's power to adjust the rights of the parties on an interstate stream, without the joinder of the states through which the river flows, has been frequently upheld. *Rickey Land & Cattle Co. v. Miller & Lux*, 218 U. S. 258, 261 (1910); *Vineyard Land & Stock Co. v. Twin Falls S. R. L. & W. Co.*, 245 Fed. 9, 25-26 (C. C. A. 9, 1917); *Howell v. Johnson*, 89 Fed. 556, 559 (C. C. Mont. 1898); *Morris v. Bean*, 146 Fed. 423, 429-430 (C. C. Mont. 1906), aff'd *Bean v. Morris*, 159 Fed. 651 (C. C. A. 9, 1908), aff'd. 221 U. S. 485 (1911); *Finney County Water Users' Ass'n. v. Graham Ditch Co.*, 1 F. 2d 650, 651-652 (Colo. 1924). To hold that a state is an indispensable party would

make it impossible for private litigants to protect their appropriation rights in an interstate stream. No such result is required, especially since no interest of the state is adjudicated by a decree fixing the rights of the several appropriators in the stream. *Hinderlider v. La Plata Co.*, 304 U. S. 92, 103 (1938); *Washington v. Oregon*, 297 U. S. 517, 528 (1936).

II

A. Inasmuch as the present appellants were parties to the original decree, it is doubtful whether they can absolve themselves of their contumacious conduct by asserting that the 1935 decree is not now binding on successors in interest in New Mexico. In any event, it is submitted that the decree is in fact binding on successors in interest. Decrees running against successors in interest are frequent in water right cases. *Ahlers v. Thomas*, 24 Nev. 407, 56 Pac. 93 (1899); *Gale v. Tuolumne County Water Co.*, 169 Cal. 46, 145 Pac. 532 (1914). That a successor in interest may be adjudged in contempt for violating a decree entered by a court of another state is illustrated by the case of *Pacific Live Stock Co. v. Rickey*, 8 F. Supp. 772 (Nev. 1934). If an innocent purchaser of water rights in California is bound to take notice of a water suit pending in Nevada, and the Supreme Court has so intimated, *Rickey Land & Cattle Co. v. Miller & Lux*, 218 U. S. 258, 262-263 (1910), there would appear to be no reason why a New Mexico successor in interest should not be required to take notice of an Arizona decree enjoining his grantor from impinging upon the rights of appropria-

tors in Arizona. If it be held that the Arizona court's decree may be thwarted by a mere transfer of rights from one New Mexico defendant to his successor in interest, then the forward steps which this Court took in adapting legal theories to realities in the *Miller & Lux* and *Vineyard Land & Stock Company* cases will have been nullified. It will mean that the courts, with the possible exception of the Supreme Court, are impotent to protect downstream users on an interstate stream.

B. Whatever be the effect of an injunction on successors in interest, it is submitted that all New Mexico water users, whether parties to the original suit or not, who use water under the Sunset Canal, are bound by the provisions of the 1935 decree against the Sunset Canal Company. This follows from the fact that a canal or ditch company can sue or be sued on behalf of its water users and the latter will be bound by the ensuing judgment, even though they were not parties to the suit. *Montezuma Canal v. Smithville Canal*, 218 U. S. 371, 382 (1910); *La Luz Com. Ditch Co. v. Town of Alamo-gordo*, 34 N. Mex. 127, 134-135, 279 Pac. 72 (1929); *River-side Water Co. v. Sargent*, 112 Cal. 230, 235, 44 Pac. 560 (1896). The Sunset Canal Company was a party to the 1925 litigation (R. 3), and its rights were determined by the 1935 decree (R. II, Article VIII). This means that all New Mexico water users under the Sunset Canal are bound by the decree against the Company.

Because of their conduct during the litigation, and since the decree was entered in 1935, the appellants are estopped to deny the corporate existence of the Sunset Canal Company. *Tulare Irrigation District v.*

Shepard, 185 U. S. 1 (1902). Furthermore, that company is an existing corporation. It was organized in 1903 (R. 241); it has since transacted business, and continues to transact business, as a corporation (R. 131, 143. It was a "quasi public" rather than a "private corporation." *Albuquerque Land Irrigation Co. v. Gutierrez*, 10 N. M. 177, 250, 61 Pac. 357 (1900), aff'd 188 U. S. 545 (1903). Hence, it was not affected by the New Mexico statute of 1921 dissolving all "private corporations" which had failed to file annual reports. It was in any event a "community ditch," which under New Mexico law is suable as a corporation. N. M. Stat. Ann. (Comp. 1929), sec. 151-414; Record 193, 196; *In re Dexter-Greenfield Drainage District*, 21 N. M. 286, 304, 154 Pac. 382 (1915).

III

A. Inasmuch as the Sunset Canal Company, as a body corporate, and Parley P. Jones, R. W. Brooks, and Rachel Jensen, individually, subjected themselves to the jurisdiction of the Arizona court prior to the entry of the 1935 decree, and in view of the fact that a contempt proceeding to enforce a decree is a part of the main action, service *de novo* is not required—notice alone suffices. *Leman v. Krentler-Arnold Co.*, 284 U. S. 448 (1932).

B. That the appellants had disobeyed the decree and subsequent orders of the court and the water commissioner, and were therefore in contempt, is apparent from the admissions in the pleadings and the evidence (R. 52, 53, 55, 58-59, 86).

C. The verified affidavits and the order to show cause established a *prima facie* case of contempt. The court was therefore correct in placing upon the respondents "the burden of going forward" with the evidence (R. 167-169). Even if this ruling be construed as requiring them to assume the "burden of proof", it was not erroneous, because the answer admitted violations of the decree and set up defenses which as a matter of law were insufficient. *Oriel v. Russell*, 278 U. S. 358 (1929). Theirs was the task of proving matters in confession and avoidance. *In re Cashman*, 168 Fed. 1008 (S. D. N. Y. 1909).

D. The court below properly rejected appellants' offer to prove that the diversion of water in New Mexico did not injure water users in Arizona. A withdrawal of water in excess of rights fixed by a decree cannot be defended by an offer of proof that the excessive withdrawals were not injurious. The other parties may insist upon their adjudicated rights. *Wyoming v. Colorado*, 309 U. S. 572, 581 (1940).

E. The fine of \$100.00 imposed upon each of the respondents, in order to reimburse the court's officer for attorneys' fees and other expenditures, was entirely proper. *Toledo Co. v. Computing Co.*, 261 U. S. 399, 428 (1923). In fixing the fine of each respondent at \$100.00, the court did not abuse its discretion. *Board of Trade of Chicago v. Tucker*, 221 Fed. 305 (C. C. A. 2, 1915).

F. Congress by statute has conferred upon the federal district courts power to punish contempts of their authority, either by fine or imprisonment, at their discretion. 28 U. S. C. secs. 385, 387. Fines are permis-

sible in civil contempt proceedings. *Feldman v. American Palestine Line*, 18 F. 2d 749 (C. C. A. 2, 1927).

ARGUMENT

In their opening brief the appellants argue that the judgment of the court below holding them in contempt is erroneous for twelve reasons. An analysis shows that these arguments are really three in number: (1) those which deny the jurisdiction of the court below to enter a decree affecting water rights in New Mexico (Br. 21-24, 33-35, 44-52); (2) those which assert that the decree is now ineffective because not binding on successors in interest in New Mexico (Br. 33, 42-43); and (3) those which directly challenge the contempt judgment itself (Br. 40-41, 43-52). It is believed that repetition may be avoided in the Government's brief if appellants' twelve arguments are considered under the three headings just mentioned.

I

The 1935 decree is not void for want of jurisdiction and is binding on the New Mexico defendants

Appellants' first line of attack is to challenge the jurisdiction of the court below to enter the decree on which the contempt proceedings were based. They contend that the 1935 decree was *coram non judice* as to water users in New Mexico, for three reasons: (a) because the court in Arizona had no jurisdiction to quiet title to water rights in New Mexico (Br. 21-24); (b) because it had no jurisdiction to order headgates and measuring devices to be installed and supervised

in New Mexico (Br. 33-35); and (c) because the State of New Mexico was an indispensable party (Br. 24-32). These contentions will be considered seriatim.

A. The federal court in Arizona, in order to determine and protect the Government's rights in the waters of the Gila River, had jurisdiction to determine the rights of other claimants, including the New Mexico defendants, and to enjoin each claimant from diverting water in such a way as to encroach upon the superior rights of the other claimants, to wit, in an amount in excess of that determined to be rightfully theirs

When the Government instituted the original action in 1925 to have its water rights in the Gila River judicially determined, it was of course familiar with certain landmark decisions which this Court had theretofore rendered in controversies involving water rights in interstate streams. In fact, cases like *Rickey Land & Cattle Co. v. Miller & Lux*, 152 Fed. 11 (C. C. A. 9, 1907) aff'd 218 U. S. 258 (1910), and *Vineyard Land & Stock Co. v. Twin Falls S. R. L. & W. Co.*, 245 Fed. 9 (C. C. A. 9, 1917), were used as a pattern in preparing the pleadings and prayer for relief in the 1925 litigation. Whether the Government deviated from those precedents may be best determined by analyzing those decisions and comparing the principles there announced with the pleadings and decree in the instant case.

The *Miller & Lux* litigation, in its various stages, is particularly instructive. The facts are these: Miller & Lux (downstream appropriators in Nevada) brought suit in a federal court of that state in 1902 to have their water rights determined and to have the defendants (upper riparian proprietors in Nevada and California) enjoined from diverting the flow of the Walker River in subversion of the plaintiffs' rights. Rickey, a Cali-

for defendant, challenged the court's jurisdiction. While conceding that it had no *in rem* jurisdiction over lands and real estate in California, the Nevada court pointed out that it did have *in personam* jurisdiction over the parties and could enjoin the California defendants from diverting water to the prejudice of downstream appropriators in Nevada. *Miller & Lux v. Rickey*, 127 Fed. 573 (C. C. Nev. 1904), citing Gould on Pleading (Hamilton ed.) p. 113; *Deseret Irrigation Co. v. McIntyre*, 16 Utah 398, 406, 52 Pac. 628 (1898); *Willey v. Decker*, 11 Wyo. 496, 73 Pac. 210 (1903); *Lower Kings River Water Ditch Co. v. Kings River & Fresno Canal Co.*, 60 Cal. 408, 410 (1882); cf. *El Paso & R. I. Ry. Co. v. District Court*, 36 N. M. 94, 8 P. 2d 1064 (1931).

While the above suit was pending in Nevada, and in order to defeat the jurisdiction of that court, Rickey formed the Rickey Land & Cattle Company, assigned his rights in California to the new corporation, which then brought suit in a state court of California to quiet its title to water rights in the Walker River, naming as defendants a number of persons not included in the Nevada litigation. Miller & Lux countered by asking the Nevada federal court to restrain the Cattle Company from the further prosecution of the quiet-title action in California. The injunction was granted, the court pointing out that "the flowing waters of the Walker river" were the subject matter in issue in each case, and that the first court to acquire jurisdiction should make the determination. *Miller & Lux v. Rickey*, 146 Fed. 574, 580-588 (C. C. Nev. 1906).

On appeal to this Court, the injunction was sustained. *Rickey Land & Cattle Co. v. Miller & Lux*, 152 Fed. 11 (C. C. A. 9, 1907). Judge Wolverton, speaking for this Court, declared (pp. 15, 17) that the original suit by Miller & Lux, in its purpose and effect, was one to quiet *their* title to realty in *Nevada*, and, therefore, properly brought in that state. *Conant v. Deep Creek & Curlew Val. Irr. Co.*, 23 Utah 627, 66 Pac. 188 (1901). Having jurisdiction over the *res*, and the person of the defendants, the Nevada court had jurisdiction to protect plaintiffs' property from *encroachments* by the defendants, whether those encroachments came from within or without the state. And, in order to determine whether plaintiffs' rights were being encroached upon, it was necessary to consider what rights the defendants had acquired under California law, whether those rights were prior in point of time to those claimed by the plaintiffs, and if not, then to settle and quiet plaintiff's title and rights thereto.

The jurisdiction of the Nevada court to ascertain the priority rights of the various claimants and to enjoin the upstream appropriators in California from diverting water in such a way as to infringe upon the rights of the downstream appropriators in Nevada was subsequently upheld by the Supreme Court. *Rickey Land & Cattle Co. v. Miller & Lux*, 218 U. S. 258 (1910). Speaking for a unanimous court (the case having been twice argued), Justice Holmes said (pp. 261-263):

The alleged rights of Miller and Lux involve a relation between parcels of land that cannot be brought within the same jurisdiction. * * *

Full justice cannot be done and anomalous results avoided unless all the rights of the parties before the court in virtue of the jurisdiction previously acquired are taken in hand. *To adjust the rights of the parties within the State requires the adjustment of the rights of the others outside of it.* * * *

We are of opinion, therefore, that *there was concurrent jurisdiction* in the two courts, and that the *substantive issues* in the Nevada and California suits *were so far the same* that the the court first seized should proceed to the *determination* without interference, on the principles now well settled as between the courts of the United States and of the States. *Prout v. Starr*, 188 U. S. 537, 544. *Ex parte Young*, 209 U. S. 123, 161, 162. * * *

It is urged that the cross bills [filed by intervening defendants] * * * were not maintainable because not in aid of the defenses to the original suit of Miller & Lux. But it might very well be, as was shown by the argument for the respondents, that even if they admitted the right of Miller and Lux still a decree as between themselves and other defendants would be necessary in order to prevent a decree for Miller and Lux from working injustice. See further, *Ames Realty Co. v. Big Indian Mining Co.*, 146 Fed. Rep. 166. The cross bills being maintainable the jurisdiction in respect of them follows that over the principal bill.

The jurisdictional objections interposed by the California defendants having been thus disposed of by the Supreme Court, the case went back to the federal court in Nevada for a decision on the merits. That court

entered a decree in 1919 adjudging each of the parties to the litigation to be "the owner of the flow and use of the several amounts of water appropriated by them respectively [as set forth in an incorporated schedule]." The decree also contained these provisions: "Each and every party to this suit, and their and each of their servants, agents and attorneys, and all persons claiming by, through or under them, and their successors and assigns in and to the water rights and lands herein described, be and each of them hereby is forever enjoined and restrained from claiming any rights in or to the waters of the Walker River * * * except the rights set up and specified in this decree, and each of the said parties is hereby enjoined and restrained from taking, diverting or interfering in any way with the waters of the Walker River or its branches or tributaries so as to in any way, shape or manner interfere with the diversion, enjoyment and use of the waters of any of the other parties to this suit as set forth in this decree * * * The State Engineer of the State of Nevada is hereby appointed a commissioner to apportion and distribute the waters of the Walker River, its forks and tributaries, in the States of Nevada *and California*, in accordance with the provisions of this decree * * *"⁵

The principles of law announced and applied in the *Miller & Lux* case were reaffirmed by this Court in *Vineyard Land & Stock Co. v. Twin Falls, S. R. L. & W.*

⁵ This decree has withstood subsequent assaults made by the California defendants and by their successors in interest. See *Pacific Live Stock Co. v. Rickey*, 8 F. Supp. 772, 773, 777-778 (Nev. 1934). Its validity was conceded in *United States v. Walker River Irr. Dist.*, 11 F. Supp. 158, 162 (Nev. 1935).

Co., 245 Fed. 9 (C. C. A. 9, 1917), a case involving conflicting claims to the waters of the Salmon River. That suit was brought in a federal court in Idaho by the downstream appropriators against certain stock raisers upstream in Idaho and Nevada. The trial court concluded that the defendants had some priority rights, described the lands to which their appropriations were appurtenant, and permitted the plaintiffs to impound the surplus waters in their downstream reservoir. The decree required the defendants to install automatic measuring devices which the plaintiffs were authorized to inspect at all times. The court retained jurisdiction to issue necessary orders and to appoint a water commissioner to make distribution in accordance with the terms of the decree. The Nevada defendants appealed, contending that the Idaho court lacked jurisdiction to enter the foregoing decree. In affirming the decree, this Court said (pp. 25, 29):

The question is presented as to the extent to which the judgment and decree of a court exercising jurisdiction in one state may become operative in another. * * * There is no attempt by the decree to quiet the defendant's title to its appropriations, *but only to determine what they were and to what lands applicable, with a view to doing justice between the parties.* It is furthermore necessary, to protect the plaintiffs against the encroachments of defendant, that the water be measured. The proper measurement is a duty personal to the defendant. It was altogether appropriate, therefore, that the court impose upon the defendant the obligation of installing automatic measuring devices, and,

for the protection of the plaintiffs, these should be subject to their inspection. So it is respecting rules regulating the manner of diverting, measuring, and distributing the water and the keeping of records of the amount of water diverted, etc. These were all directions of the court operating in personam, and not directly upon the res, and were and are within the court's equitable jurisdiction *to determine and declare*.

It is submitted that the pleadings and the decree in the instant case do not differ in any essential aspects from the pleadings and decrees which this Court approved in the foregoing cases. For example, in its prayer for relief in this case, the Government asked that the Arizona and New Mexico defendants be required to answer the complaint and to "set up fully their claims to the waters" of the Gila River, that the court by its decree "determine" the rights and priorities of the various claimants, and that the court decree to the United States the water rights set forth in its bill of complaint, and "quiet *its* title therein, and *enjoin* said defendants and each of them from interfering therewith" (R. 25). It was of course necessary, before such relief could be granted, to "determine" the priority rights of other claimants, inasmuch as the United States did not base its entire claim on a single immemorial appropriation. It claimed, for example, additional water rights with priorities between 1846 and 1924, including a storage right sufficient to fill the Coolidge Reservoir (1,285,000 acre feet)—the latter with an alleged priority not later than 1896 (R. 22-23).⁶ In order

⁶ In the consent decree the priority date as against the defendants in this decree was fixed as of 1924 (R. II, 105; *infra* p. 69).

to determine just what rights the Government acquired under these later appropriations, it was necessary for the court to ascertain what intervening rights had been perfected by the several defendants, and if the reservoir was to have any utility to see that no unlawful diversions were made upstream. Since the defendants answered the complaint and asked for cross-relief as against the Government and as against each other, there was no reason why the court below, with personal jurisdiction over all parties, should not enjoin each and every defendant from interfering with the water rights of the other parties. Similar cross-relief in favor of the several defendants was approved by the Supreme Court in the *Miller & Lux* case, 218 U. S. 258, 263 (1910); see also *Rickey Land & Cattle Co. v. Wood*, 152 Fed. 22, 24-25 (C. C. A. 9, 1907); *Ames Realty Co. v. Big Indian Mining Co.*, 146 Fed. 166 (C. C. Mont. 1906).

Nor did the consent decree which the court below entered on June 29, 1935, differ materially from the Walker River (Miller & Lux) and Salmon River decrees. The 1935 decree follows almost verbatim the language used in the Walker River decree (*supra*, p. 23). It states that "each and all of the parties, . . . their assigns and successors in interest, servants, agents, attorneys and all persons claiming by, through or under them and their successors, are hereby forever enjoined and restrained from asserting or claiming—as against any of the parties herein, their assigns or successors, or their rights as decreed herein—any right, title or interest in or to the waters of the Gila River, or any

thereof, except the rights specified, determined and allowed by this decree, and each and all thereof are hereby perpetually restrained and enjoined from diverting, taking or interfering in any way with the waters of the Gila River or any part thereof, so as in any manner to prevent or interfere with the diversion, use or enjoyment of said waters . . . by the owners of prior or superior rights therein as defined and established by this Decree (R. II, 113; Br. Appx. pp. v-vi).” This decree, like the Salmon River decree, provided for the installation of automatic measuring devices, and like both the Salmon River and Walker River decrees it provided for the appointment of a water commissioner to see that all diversions conformed to the decree. Any decree less broad would not have prevented encroachments on the Government’s direct diversion and storage rights in Arizona.

If the Nevada court and the Idaho court had jurisdiction to enter the decrees they did, and this Court has so held, then it is submitted that the court below had jurisdiction to enter the 1935 decree which defendants are now attacking. In each of the three cases, the suit was commenced by a downstream appropriator in the State where his land was situated. In each case some water was being diverted upstream for use on lands located in another state, and in each case the upstream diverters were joined as parties defendant. And in each case the court, after obtaining personal jurisdiction over the defendants, “determined” or “adjusted” the rights of the upstream proprietors as well as the downstream appropriators, and on the

basis of these "determinations" perpetually enjoined the defendants and their successors from diverting water in any manner other than that specified in the decree. It is therefore apparent that the 1935 decree conforms to the established and approved precedents.

Furthermore, these precedents are sound. It is well established that a court has jurisdiction to prevent a defendant from committing acts outside the state which encroach upon property rights within the state. *Salton Sea Cases*, 172 Fed. 792 (C. C. A. 9, 1909), certiorari denied 215 U. S. 603; *Great Falls Manufacturing Co. v. Worster*, 23 N. H. 462 (1851); *New Jersey v. New York City*, 283 U. S. 473; 482 (1931); cf. *Thayer v. Brooks*, 17 Ohio 489 (1848). Because of the very nature of water right controversies, especially where storage rights are involved, it is impossible to decide whether rights within one state are being encroached upon without first determining the extent of the defendants' rights in the other state. And in order to protect direct diversion and storage rights within a state it is necessary to prevent the upstream defendants in another state from taking water in excess of their lawful rights. Therefore, while an injunction may in effect determine the water rights of users in the upper state, the whole purpose of such a decree is to protect rights within the state, a matter which is admittedly within the jurisdiction of a court of equity. The mere fact that the injunction may affect the use to which a defendant may put his property in another state does not deprive a court of equity of jurisdiction. Injunctions and decrees in one state frequently restrict one's use of, or rights in, real property in another state. *Massie v.*

Watts, 6 Cranch 148 (1810); *Jamestown v. Pennsylvania Gas Co.*, 264 Fed. 1009 (W. D. N. Y. 1920), 1 F. 2d 871 (C. C. A. 2, 1924); *Western Union Telegraph Co. v. Louisville & N. R. Co.*, 201 Fed. 946 (W. D. Ky. 1913), affirmed 207 Fed. 1 (C. C. A. 6, 1913); *Niagara Falls International Bridge Co. v. Grand Trunk Ry. Co.*, 241 N. Y. 85, 148 N. E. 797 (1925).

In somewhat analogous situations the courts have not hesitated to exercise jurisdiction even though their decrees affected real property in another jurisdiction. For example, in mortgage foreclosure cases, the courts have ordered railroad, bridge, and canal properties to be disposed of as an economic unit notwithstanding the fact that a part of the property involved was situated in another state. *Muller v. Dows*, 94 U. S. 444 (1876); *International Bridge Co. v. Holland Trust Co.*, 81 Fed. 422 (C. C. A. 5, 1897); *Brown v. Chesapeake and Ohio Canal Co.*, 73 Md. 567 (1890).

Similarly, in cases where the several users of water within a state do not all reside in the same county, the state courts have repeatedly held that a county court's jurisdiction to determine water rights does not stop at the county line. *El Paso & R. I. Ry. Co. v. District Court*, 36 N. M. 94, 8 P. 2d 1064 (1931); *Lower Kings River Water Ditch Co. v. Kings River & Fresno Canal Co.*, 60 Cal. 408, 410 (1882); *Deseret Irrigation Co. v. McIntyre*, 16 Utah 398, 406, 52 Pac. 628 (1898).

Decrees determining the rights of numerous users in the waters of an interstate stream have been variously explained. There are three theories: (1) that the decree operates *in rem*, or *quasi in rem*, even as to lands situated in another state; (2) that the decree is one *in*

personam insofar as it affects water rights in another jurisdiction; and (3) that the decree in a water rights case is *sui generis*.

Although the first concept might at first blush appear to run counter to the traditional notion that the courts of one state cannot quiet title to real estate in another jurisdiction, it must be remembered that the sole purpose of the determination is to prevent encroachments on rights downstream. And the Supreme Court's opinion in the *Miller & Lux* case supports the theory that a court in water rights cases may enter a decree which has a substantially *in rem* effect even as to persons who are using water in another state. Mr. Justice Holmes in that case pointed out that the rights of the several parties "cannot be brought within the same jurisdiction," and that "full justice cannot be done and anomalous results avoided unless *all the rights* of the parties before the court . . . are taken in hand," inasmuch as the adjustment of the rights of the parties within the state requires "*the adjustment* of the rights of the others outside of it." He therefore concluded that "there was concurrent jurisdiction in the two courts, and that the substantive issues in the Nevada and California suits were *so far the same* that the court first seized should proceed to the *determination* without interference." *Rickey Land & Cattle Co. v. Miller & Lux*, 218 U. S. 258, 262 (1910).

The Supreme Court therefore sustained an injunction prohibiting the prosecution in California of a strictly *in rem* suit to quiet title, on the theory that the substantive issues in the California and Nevada cases were substantially the same. If the Nevada court could not determine the relative rights of the California

defendants, then clearly they had a right at any time to start a quiet title suit in California, because it is well established law that a federal court will not enjoin proceedings in a state court unless the issues in both cases are similar to a point of "substantial identity." *Pacific Live Stock Co. v. Oregon Water Rdl.*, 241 U. S. 440, 447 (1916). "The rule, therefore, has become generally established that where the action first brought is *in personam* and seeks only a personal judgment, another action for the same cause in another jurisdiction is not precluded." *Kline v. Burke Constr. Co.*, 260 U. S. 226, 230 (1922). Therefore, in sustaining the Nevada injunction, the Supreme Court in effect held (1) that the Nevada court had power to determine and adjudicate the rights of every water user represented in the Nevada proceedings, no matter where his use took place, and (2) that the decision of the Nevada court would be controlling in any subsequent proceeding in California.⁷

The second, or more traditional view, is that the decree operates *in personam* as to those defendants using water from the same stream in another state. Numerous decisions support this view. *Vineyard Land & Stock Co. v. Twin Falls S. R. L. & W. Co.*, 245 Fed. 9 (C. C. A. 9, 1917); *Miller & Lux v. Rickey*, 127 Fed. 573 (C. C. Nev. 1904); *Taylor v. Hulett*, 15 Idaho 265, 272, 97 Pac. 37 (1908); *cf. Willey v. Decker*, 11 Wyo. 496, 538-547, 73 Pac. 210 (1903); *Conant v. Deep Creek*

⁷ On this latter point, the Nevada court had said: "The suits in this court will quiet and settle the title or *rights* of the respective parties to the *flowing waters* of the Walker river." *Miller & Lux v. Rickey*, 146 Fed. 574, 588 (C. C. Nev. 1906). The Supreme Court's affirmance of the injunction can only be justified on a like view of the Nevada court's jurisdiction.

& *Curlew Val. Irr. Co.*, 23 Utah, 627, 66 Pac. 188 (1901); *Albion-Idaho Land Co. v. Naf. Irr. Co.*, 97 2d 439 (C. C. A. 10, 1938).

The third view, that decrees determining water rights are *sui generis*, is supported by this Court's decisions in the *Miller & Lux* litigation: "A suit respecting water appropriations from a stream is *sui generis*, and it may, and does frequently, happen that, in order fully to protect the rights of one appropriator against those of another, it is necessary to *determine* also the rights of the former, not only with reference to those of that other, but also with reference to still others upon the same stream." *Rickey Land & Cattle Co. v. Wood*, 152 Fed. 22, 24 (C. C. A. 9, 1907), affirmed *sub nom. Rickey Land & Cattle Co. v. Miller & Lux*, 218 U. S. 258, 263 (1910); see also *Ames Realty Co. v. Big Indian Mining Co.*, 146 Fed. 166 (C. C. Mont. 1906); *Union Mill & Mining Co. v. Dangberg*, 81 Fed. 73, 88, 119 (C. C. Nev. 1897). Since the relations between different appropriators on the same stream are interdependent, "one appropriator cannot always be fully protected against the injunctive process of another, unless at the same time he has his own rights *ascertained* and *determined* with relation to still others." *Rickey Land & Cattle Co. v. Wood*, 152 Fed. 22, 25 (C. C. A. 9, 1907). The "flowing waters" of the river constitute the subject matter of the litigation in water-right cases. *Ames Realty Co. v. Indian Mining Co.*, 146 Fed. 166, 168, 170 (C. C. Mont. 1906); *Miller & Lux v. Rickey*, 146 Fed. 574, 585 (C. C. Nev. 1906). "The water in the stream, which has a propensity to seek its level, and will continue its current to the sea, is in strict reality the ver-

itable thing in controversy. It knows not imaginary state or county lines, and is a thing in which no man has a property until captured to be applied to a beneficial use." *Rickey Land & Cattle Co. v. Miller & Lux*, 152 Fed. 11, 17 (C. C. A. 9, 1907).

But whether the decree be viewed as *in rem*, *in personam*, or *sui generis*, it is evident that the 1935 decree is in all essential respects identical with previous decrees approved by this Court. The decree is not to be vitiated by calling it an *in rem* decree quieting title to lands in New Mexico (Br. 21-24). The "tyranny of labels" all too often thwarts the growth and development of the law. The principles announced by this Court in *Rickey Land & Cattle Co. v. Miller & Lux* and in *Vineyard Land & Stock Co. v. Twin Falls S. R. L. & W. Co.* have withstood the test of time; they are sound; they are conducive to justice; they end vexatious litigation. There is no reason why this Court should recede from the doctrines there announced, and since accepted in other jurisdictions. *Taylor v. Hulett*, 15 Idaho 265, 269-272, 97 Pac. 37 (1908); *Jamestown v. Pennsylvania Gas Co.*, 264 Fed. 1009, 1011 (W. D. N. Y. 1920) *aff'd*. 1 F. 2d 871 (C. C. A. 2, 1924); *Louisville & N. R. Co. v. Western Union Telegraph Co.*, 207 Fed. 1, 8 (C. C. A. 6, 1913); *Niagara Falls International Bridge Co. v. Grand Trunk Ry. Co.*, 241 N. Y. 85, 148 N. E. 797 (1925).

Certainly the tenth circuit's decision in *Albion-Idaho Land Co. v. Naf Irr. Co.*, 97 F. 2d 439 (C. C. A. 10, 1938), dictates no contrary conclusion. While the result reached in that case was eminently just, it is believed that the court was too cavalier in its treatment of the Hart decree. And it is to be noted that the decree

in the *Albion* case did in reality affect individual priorities in Idaho, the very thing which the circuit court said could not be done. Their statement that the federal district court of Utah could only determine the aggregate rights of the users in Idaho and not their individual priorities is illogical, especially if applied to the converse situation where a court in a downstream state is seeking to prevent wrongful diversions upstream. A decree determining the individual rights of the foreign group and enjoining each member individually from diverting more than the amount decreed is no more in excess of the court's jurisdiction than one determining the aggregate rights of the foreign group and enjoining them jointly from diverting in excess. If a court has jurisdiction in the latter case, it has jurisdiction in the former. Moreover, such a decree only gives partial protection to a plaintiff, as against upstream diverters, since his right is a right against each individual water user on the stream, to have each user refrain from diverting an amount of water greater than that to which he is legally entitled, to the injury of the plaintiff. This is especially true in this case because the Government has storage rights as to all waters which were unappropriated in 1924. A decree which determines only the plaintiff's right against a group of appropriators jointly will be of no assistance as against excessive diversions by any one of the foreign group of appropriators, and it may also be highly prejudicial to all members of the group whose aggregate rights are decreed. Cf. *Rickey Land & Cattle Co. v. Wood*, 152 Fed. 22, 24 (C. C. A. 9, 1907); *Ames Realty Co. v. Big Indian Mining Co.*, 146 Fed. 166 (C. C. Mont. 1906).

It is therefore submitted that on both reason and authority the court below, in protecting appropriators within the state of Arizona, had jurisdiction at the same time and for that purpose to inquire into and determine rights and priorities of the New Mexico defendants so as to prevent them from encroaching upon the rights of the Arizona appropriators.

B. The federal district court of Arizona had jurisdiction to require the Sunset Canal Company to install and maintain locks and measuring devices on its headgates in New Mexico and to appoint a commissioner to see that the provisions of the decree were respected by water users in New Mexico

That a court of equity, with personal jurisdiction over a defendant, can issue a *negative* injunction restraining him from so using his property in another state as to injure plaintiff's property within the state, has long been conceded. *Great Falls Manufacturing Co. v. Worster*, 23 N. H. 462 (1851); *Western Union Telegraph Co. v. Louisville & N. R. Co.*, 201 Fed. 946 (W. D. Ky. 1913), affirmed 207 Fed. 1 (C. C. A. 6, 1913); *Niagara Falls International Bridge Co. v. Grand Trunk Ry. Co.*, 241 N. Y. 85, 148 N. E. 797 (1925). But until quite recently there have been some who doubted an equity court's power to order *affirmative* acts to be done in another jurisdiction. See 1 Beale, *Conflict of Laws* (1935), pp. 415, 431-434. That narrow concept of a court's power to accomplish justice was repudiated by this Court in the famous *Salton Sea Cases*, 172 Fed. 792 (C. C. A. 9, 1909), certiorari denied 215 U. S. 603. In those cases, it will be recalled, this Court affirmed a decree of the district court in California ordering the defendants, who were diverting waters from the Colorado River, to install headgates

in Mexico adequate to prevent the waters of that river from flooding plaintiff's salt mines in California. Similarly, in *Vineyard Land & Stock Co. v. Twin Falls S. R. L. & W. Co.*, 245 Fed. 9, 29 (1917), this Court affirmed a decree of the Idaho court ordering the Nevada defendants to install automatic devices for the measurement of water in Nevada.

Largely because of this Court's trail-blazing decisions in the *Miller & Lux* and the *Salton Sea Cases*, Professor Beale in 1913 observed that "the federal courts show a tendency to transcend state lines in the exercise of equity jurisdiction."⁸ This tendency has since spread to other courts.^{8a} In fact, the authorities now generally agree that an equity court may commend a person before it to do an act in another state, and the fact that the act is to be done abroad goes merely to the discretion of the court in issuing the decree and not to its jurisdiction.⁹

⁸ Jurisdiction of Courts over Foreigners, 26 Harv. L. Rev. 283, 295 (1913).

^{8a} A classic illustration is *Madden v. Rosseter*, 114 Misc. 416, 187 N. Y. S. 462 (1921). In that case the New York supreme court appointed a receiver and ordered him to proceed to California, there to take possession of a thoroughbred race horse (through legal process if necessary), and to return the horse to the plaintiff in time for the Kentucky races.

⁹ Note, 35 Harv. L. Rev. 610 (1922); note, 20 Ill. L. Rev. 594, 599 (1926); Messner, Jurisdiction of Equity, 14 Minn. L. Rev. 494, 517-529 (1930); Walsh, Equity (1930), sec. 18. The cases in point are collected in 1 Chafee and Simpson, Cases on Equity (1934), pp. 208, 210; Note, 17 Harv. L. Rev. 572 (1904); Note, 23 Harv. L. Rev. 390 (1910); Note, 5 Ill. L. Rev. 442 (1911); Note, 31 Harv. L. Rev. 646 (1918); Note, 27 Yale L. J. 946

Since no single court has physical jurisdiction of the entire Gila River, justice can only be done by having all rights determined and enforced by one court. If, in order to accomplish that end, affirmative but lawful acts must be done abroad, there is no reason why their performance should not be ordered.

It cannot be said that the provisions of the 1935 decree are in conflict with the law of New Mexico. That state must respect prior water rights acquired by downstream appropriators, where the United States is claiming rights acquired and vested under federal law before New Mexico became a state. *Winters v. United States*, 207 U. S. 564 (1908); *Bean v. Morris*, 159 Fed. 651, 654 (C. C. A. 9, 1908); *Howell v. Johnson*, 89 Fed. 556 (C. C. Mont. 1898); *Anderson v. Bassman*, 140 Fed. 14, 20 (C. C. N. D. Cal. 1905). “* * * the right acquired by an appropriation includes the right to have the water flow in the stream to the point of diversion. The fact of a state line intersecting the stream does not, within itself, impinge upon the right.” *Rickey Land & Cattle Co. v. Miller & Lux*, 152 Fed. 11, 18 (C. C. A. 9, 1907). The usufructuary right is coextensive with the stream. There is certainly no statute of New Mexico which imposes upon her officials a mandatory duty to administer the waters of the Gila River in derogation

(1918); Note, 6 Cornell L. Q. 423 (1921); Note, 30 Yale L. J. 865 (1921); Note, 71 A. L. R. 1351 (1931). The American Law Institute in its Conflict of Laws Restatement (1934) states the rule in this fashion: “§ 94. A state can exercise jurisdiction through its courts to make a decree directing a party subject to the jurisdiction of the court to do an act in another state, provided such act is not contrary to the law of the state in which it is to be performed.”

of the prior rights of downstream water users. We should indulge the presumption that the State of New Mexico does not intend to nullify the lawful adjudications of the federal courts. In all their acts to date, the officers of the state have been careful to declare that the contemplated action was being taken because they believed the Arizona decree to be invalid (R. 231, 238-239). Therefore, we may assume, once this Court reaffirms the validity of the 1935 decree, that the New Mexico state officials will respect its provisions. They have no lawful authority to do otherwise.

In short, both reason and precedent make it clear that the court below had jurisdiction to require the Sunset Canal Company to install and maintain locks and measuring devices on its headgates in New Mexico, and to appoint a commissioner to see that the decree was properly administered. That decree is not to be nullified by "labelling" it a decree operating "directly on the river and canals in New Mexico" (Br. 33-37). This Court in *Vineyard Land & Stock Co. v. Twin Falls S. R. L. & W. Co.*, 245 Fed. 9, 29 (C. C. A. 1917), was careful to point out that a decree requiring headgates to be installed and all diversions carefully checked operated "*in personam*, and not directly upon the *res*," and that such a decree is within a court's "equitable jurisdiction to determine and declare."

C. The State of New Mexico was not an indispensable party to the decree

It is not now open to the appellants to assert that the State of New Mexico was an indispensable party. The decree was entered with their consent. For three years

they respected its provisions. It is no justification now, after they disobey the decree, to say that the State of New Mexico was not a party. The absence of an indispensable party from a proceeding, while it may be urged at any stage of the proceeding itself, prior to the entry of the final decree, does not go to the jurisdiction of the court to enter the decree. *Rood v. Goodman*, 83 F. 2d 28, 32 (C. C. A. 5, 1936) certiorari denied 299 U. S. 551; *State of Washington v. United States*, 87 F. 2d 421, 427, 431 (C. C. A. 9, 1936), *Elcmendorf v. Taylor*, 10 Wheat, 152, 166 (1825); *Mallow v. Hinde*, 12 Wheat. 193, 197 (1827). The rights and obligations of the appellants, as respects the United States and the other parties to the decree, were fully litigated and determined. Accordingly, the defense that the decree did not determine the rights of New Mexico is not now available to the appellants as a defense to the contempt proceedings.

Furthermore, the State of New Mexico was not an indispensable party. In several cases the courts have protected the owner of a water right in one state against diversions under rights claimed in another state,¹⁰ but

¹⁰ *Rickey Land & Cattle Co. v. Miller & Lux*, 218 U. S. 258, 261 (1910); *Bean v. Morris*, 221 U. S. 485 (1911), affg. 159 Fed. 651 (C. C. A. 9, 1908), affg. 146 Fed. 423, 429-430 (C. C. S. Mont. 1906); *Vineyard Land & Stock Co. v. Twin Falls S. R. L. & W. Co.*, 245 Fed. 9 (C. C. A. 9, 1917); *Howell v. Johnson*, 89 Fed. 556, 559 (C. C. Mont. 1898); *Hoge v. Eaton*, 135 Fed. 411 (C. C. Colo. 1905); *Anderson v. Bassman*, 140 Fed. 14 (C. C. N. D. Cal. 1905); *United States v. Walker River Irr. Dist.*, 11 F. Supp. 158 (Nev. 1935); *Taylor v. Hulett*, 15 Idaho 265, 97 Pac. 37 (1908); *Willey v. Decker*, 11 Wyo. 496, 73 Pac. 210 (1903); see *Conant v. Deep Creek & Curlew Valley Irrigation Co.*, 23 Utah 627, 66 Pac. 188 (1901).

in none of these was it intimated that either state was an indispensable party to the controversy. On the contrary in *Rickey Land & Cattle Co. v. Miller & Lux*, 218 U. S. 258, 261 (1910), in *Morris v. Bean*, 146 Fed. 423, 429-430 (C. C. Mont. 1906), aff'd. *Bean v. Morris*, 159 Fed. 651 (C. C. A. 9, 1908), aff'd. 221 U. S. 485 (1911), and in *Finney County Water Users' Ass'n. v. Graham Ditch Co.*, 1 F. 2d 650, 651-652 (Colo. 1924), it was unsuccessfully contended that the water right owner may be protected against diversions in another state only through a suit instituted by one state against another in the Supreme Court. In *Vineyard Land & Stock Co. v. Twin Falls S. R. L. & W. Co.*, 245 Fed. 9, 25-26 (C. C. A. 9, 1917), and in *Howell v. Johnson*, 89 Fed. 556, 559 (C. C. Mont. 1898), the interest of the state was unsuccessfully asserted as a bar to a suit by a downstream appropriator to enjoin excessive diversion by an upstream diverter in another state. In all these cases the court's power to adjust the rights of the parties, without joinder of the state, was upheld.

This result is just and logical. Obviously, if either New Mexico or Arizona is an indispensable party in this case, the water right owners on an interstate stream can never have judicial protection against excessive diversions in another state, except with the consent of both states, or in the limited class of cases in which a state may be made party to a suit within the original jurisdiction of the Supreme Court. In order to avoid such a failure of justice, the courts originated the distinction between necessary parties, who must be joined only if they can be reached, and indispensable parties

who must be joined before a court of equity will proceed. As stated in *Stanley v. Schwalby*, 147 U. S. 508, 518 (1892); *Cunningham v. Macon & Brunswick R. R. Co.*, 109 U. S. 446, 451 (1882), the courts, out of a desire to do justice, tend to go a long way in holding the state not an indispensable party. This decree will not be regarded in a subsequent suit as binding on the states of New Mexico and Arizona, who were not parties to the decree. *Hinderlider v. La Plata Co.*, 304 U. S. 92, 103 (1938); *Washington v. Oregon*, 297 U. S. 517, 528 (1936); cf. *Arkansas v. Tennessee*, 246 U. S. 158, 176 (1918); *Fowler v. Lindsey*, 3 Dall. 411 (1799). The policy of avoiding multiplicity of suits will require the joinder of an available person as a necessary party, but it is not a sufficient consideration to make him indispensable. *Mallow v. Hinde*, 12 Wheat. 193, 197 (1827); cf. *Elmendorf v. Taylor*, 10 Wheat. 152, 166 (1825).¹¹

In citing *Rickey Land & Cattle Co. v. Miller & Lux*, 218 U. S. 258, 262, and 1 Wiel, Water Rights in the Western States (3d ed. 1911) p. 364, for the proposition that the decree is not valid as to the New Mexico defendants without the consent of the State of New Mex-

¹¹ The present case is closely analogous to those in which private parties sue to establish title or recover possession of land, where the suit involves the location of a boundary line between states. Such suits have always been entertained in the federal and state courts without requiring the presence of either state. *Handly's Lessee v. Anthony*, 5 Wheat. 374 (1820); *Harcourt v. Gaillard*, 12 Wheat. 523 (1827); see *Rhode Island v. Massachusetts*, 12 Pet. 657, 726-727 (1838); *Hinderlider v. La Plata Co.*, 304 U. S. 92, 111 (1938).

ico (Br. 27-28), appellants mistake the purport of the language of Justice Holmes in the *Miller & Lux* case. That language does not mean that a joint commission must be set up between the states as a prerequisite to the enforcement in one state of water rights arising in another. If this were required, the Supreme Court's decision, both in the *Miller & Lux* case and in *Bean v. Morris*, 221 U. S. 485 (1911), could not be sustained, because in neither of those cases was there such a joint commission. In those cases Justice Holmes regarded a concurrence of the two states as being necessary to create private rights and obligations across their common boundary line (218 U. S. 262; 221 U. S. 486), but the concurrence was found in the fact that the laws of neither state excluded such rights and that the water law of both states was similar. *Bean v. Morris*, *supra*, p. 487. In the instant case, the doctrine of prior appropriation prevails in both Arizona and New Mexico.¹² Where such doctrines exist, "the analogies are in favor of allowing them to be enforced within the jurisdiction of either party to the joint arrangement." *Rickey Land & Cattle Co. v. Miller & Lux*, 218 U. S. 258, 262 (1910); *Hoge v. Eaton*, 135 Fed. 411 (C. C. Colo. 1905).

¹² *Arizona: Clough v. Wing*, 2 Ariz. 371, 377-383, 17 Pac. 453 (1888), see *Water Conserv. Dist. No. 1 v. Cotton Co.*, 39 Ariz. 65, 75, 77, 4 P. 2d 369 (1931).

New Mexico: Snow v. Abalos, 18 N. M. 681, 693, 140 Pac. 1044 (1914); *Albuquerque Land Irrigation Co. v. Gutierrez*, 10 N. M. 177, 240, 61 Pac. 357 (1900); N. M. Const., Art. XVI (1911); N. M. Stat. Ann. (Comp. 1929), sec. 151-101; Act of March 3, 1877, c. 107, 19 Stat. 377.

New Mexico has not, as appellants contend, taken such control of the Gila River as to make the decree ineffective because of the state's absence. New Mexico legislation has established the office of state engineer, whose supervision of the waters of the state must be in accordance with "the adjudications of the courts." N. M. Stat. Ann. (Comp. 1929) sec. 151-112. It appears from the record that if the Arizona federal court is held to have jurisdiction to enter the decree it did, the New Mexico officials will respect the decree (R. 231, 238-239). It is to be presumed state officials will always respect the lawful adjudications of the federal courts.

In brief, the jurisdictional objections to the 1935 decree are without merit: The Arizona court had jurisdiction to determine the water rights of appropriators in Arizona and to prevent the New Mexico defendants from interfering therewith. Whether rights in Arizona were being encroached upon could not be determined until the rights of the New Mexico defendants had been determined. And to prevent interference with the decreed rights in Arizona, it was necessary that the diversions in New Mexico be measured and supervised. The court below therefore had jurisdiction to enter the decree it did against water users in New Mexico. And since no rights of New Mexico are adjudicated by the decree, the state was not an indispensable party. Hence, appellants' contention (Br. 21) that the court below should have vacated its 1935 decree insofar as it affects water rights in New Mexico is without merit.

The 1935 decree is binding on successors in interest in New Mexico

Appellants, as their second main argument, contend that even if the 1935 decree was binding on the original New Mexico defendants, it is not binding on their successors in interest, and assert that one-half of the water rights decreed to the New Mexico defendants have passed to successors in interest. And, since the decree is not now binding as to all New Mexico water users, they say it can be enforced against none (Br. 33, 42-43).

No successors in interest are included in the contempt judgment. Each of the present appellants was a party to the original decree. It is no defense for them to say that someone else might not be bound by the decree. The situation is not unlike that which frequently arises when some of the parties to a decree leave the jurisdiction. The decree is not thereby rendered any the less binding as to persons still subject to the court's process. In the instant case the court expressly retained jurisdiction after it entered its decree in 1935 (R. II, 112-113; Br. Appx. vii). Each of the present appellants was a party to that suit, and each of them has answered the citation for contempt. They cannot absolve themselves of their contumacious conduct by asserting that rights decreed to other New Mexico water users have since been transferred to successors in interest. It is thus apparent that the argument of appellants that successors in interest are not bound by the decree is not available to the present appellants. But inasmuch as the primary purpose of the present

contempt proceeding is to enforce the 1935 decree as against the New Mexico water users in general, and inasmuch as appellants have challenged its enforceability as respects successors in interests, it is hoped that this Court will dispose of appellants' argument respecting successors in interest on the broad grounds hereinafter mentioned.

It is submitted that the decree is just as binding on successors in interest as it was on the original New Mexico defendants, for the following reasons:

A. An injunction against "successors in interest" is binding

The decree in the instant case enjoins "each and all of the parties * * * their assigns and successors in interest, servants, agents, attorneys and all persons claiming by, through or under them and their successors" from claiming or diverting water in any manner other than that fixed by the decree (R. II, 113; Br. Appx. v-vi). Such an injunction is effective not only as against the party defendant, but also a successor in interest who has notice of its provisions. *In re Lennon*, 166 U. S. 548, 554 (1897); *Ahlers v. Thomas*, 24 Nev. 407, 56 Pac. 93 (1899); *Gale v. Tuolumne County Water Co.*, 169 Cal. 46, 145 Pac. 532 (1914); *Lake v. Superior Court*, 165 Cal. 182, 131 Pac. 371 (1913); 2 High on Injunctions (4th ed. 1905), sec. 1440a; 1 Freeman on Judgments (5th ed. 1925), sec. 439, p. 965; 32 C. J. "Injunctions," p. 490. In *Ahlers v. Thomas*, *supra*, an injunction had been entered enjoining the diversion of water in a stream by the defendants and their successors. Ahlers, as successor to the defendants, was found guilty of contempt for violating the decree. He contended that the injunction was not bind-

ing upon him because he was not a party to the proceeding. The court held (p. 408):

The general rule is that judgments are binding only upon parties, but there are exceptions as in the case of privies. When a judgment has been rendered between the parties, they are bound by it; and, to give full effect to the principle by which the parties are held bound by it, all persons who are represented by the parties, and claim under them, or are privy to them, are equally concluded by the same proceedings.

The *Ahlers* case cannot be explained as an *in rem* decree, for it is well established that a decree in a water rights case does not bind interests not represented in the litigation, as a strictly *in rem* proceeding would. The injunction in that case therefore operated *in personam*, like most injunctions do. If it binds a successor in interest to a defendant within the state, there would appear to be no reason why it should not bind a successor in interest to a defendant in another state.

That a successor in interest to a water user in another state may be adjudged in contempt for violating an injunction against his predecessor is illustrated by the case of *Pacific Live Stock Co. v. Rickey*, 8 F. Supp. 772 (Nev. 1934). That case involved the decree which the Nevada court had entered in 1919 fixing the rights of all the Nevada and California defendants in the *Miller & Lux* litigation. After the decree was entered, the Antelope Valley Mutual Water Company acquired the rights of one of the California defendants, and diverted water in violation of the decree. The Nevada District Court held the successor company in contempt. This holding is in accord with principles announced by

the Supreme Court in the *Miller & Lux* case, 218 U. S. 258 (1910).¹³ There the argument was made (p. 261) that the doctrine of *lis pendens* should not affect land in another jurisdiction. This contention was rejected (pp. 262-263), Justice Holmes intimating that an innocent purchaser might "be confined to asserting its rights in the pending cause." If a California purchaser is required to take notice of a pending water right suit in Nevada and come in and defend or be bound by the decree against his grantor, it would naturally follow that a New Mexico purchaser should be required to take notice of a final decree enjoining his grantor from claiming water rights in derogation of other water users. Cf. *Miller & Lux v. Rickey*, 146 Fed. 574-585 (C. C. Nev. 1906).

If a decree in an interstate water suit, with hundreds of claimants involved, ceases to be binding the moment one defendant decides to transfer his rights to a third party, the decree is indeed worthless. A court's powers are not so limited. *Rickey Land & Cattle Co. v. Miller & Lux*, 218 U. S. 258, 262-263 (1910).

B. All New Mexico water users, whether parties to the original suit or not, who use water diverted by the Sunset Canal Company are bound by the provisions of the decree determining the diversion rights of that company

Nearly all water used in the Virden Valley in New Mexico is diverted by the Sunset Canal Company and is distributed through its ditches. The Sunset Canal Company was made a primary defendant in the 1925 litiga-

¹³ Appellants' quotation from that case to a contrary effect is a quotation from Mr. Justice Holmes' summary of the petitioner's argument (pp. 260-261) and not from the court's conclusions in that case (pp. 262-263).

tion (R. 3). Out of an abundance of caution, the individual users of water from the Sunset Canal were also named (R. 3-4). The Sunset Canal Company and the individual users entered an appearance, answered the complaint, and asked for cross-relief (R. 29-45). Under the decree the Sunset Canal Company, and the company alone, was authorized to divert water from the Gila River for all lands under its canal system (R. II, 106; Br. Appt. p. iii). While the decree, primarily for purpose of convenience in determining priorities, sets forth the amount of water each user was entitled to, it did not purport to adjudicate all contract rights between the various canal companies and their respective members (R. II, 112, *infra*, p. 70).

The Sunset Canal Company was made a primary defendant and the decree was made to run against it for a purpose. It is black letter law in the western states that a canal or ditch company can sue or be sued on behalf of its water users and the latter will be bound by the ensuing judgment, even though they were not parties to the suit. *Montezuma Canal v. Smithville Canal*, 218 U. S. 371, 382 (1910); *La Luz Com. Ditch Co. v. Town of Alamogordo*, 34 N. M. 127, 134-135, 279 Pac. 72 (1929); *Riverside Water Co. v. Sargent*, 112 Cal. 230, 235, 44 Pac. 560 (1896); *Arroyo D. and W. Co. v. Baldwin*, 155 Cal. 280, 285-286, 100 Pac. 874 (1909); *Town Sterling v. Pawnee D. E. Co.*, 42 Colo. 421, 431-432, 94 Pac. 339 (1908). In *Riverside Water Co. v. Sargent*, *supra*, the court said (p. 235):

* * * appellant mistakes in assuming, as it apparently does, that the ditch company can be bound only for the interests of those of its

shareholders who appear and make proof of their several claims; its rights as trustee for all the shareholders, is to establish its claim to all the water owned or controlled by it for their benefit whether the individuals to whom the water is apportionable are before the court or not.

Therefore, when the Sunset Canal Company came in and defended the suit and consented to the 1935 decree fixing its diversion rights, the decree became binding not only on the company itself but also on all its members and their successors. The users of water from the company's ditches cannot individually or collectively insist on greater rights than were decreed to the company itself. It therefore follows that all New Mexico water users, whether parties to the original suit or not, who use water supplied by the Sunset Canal Company are bound by the provisions of the decree determining the diversion rights of that company. They can convey no greater rights to their successors in interest than they themselves possessed.

Fully aware of the consequences of an adjudication against a canal company, appellants seek to thwart the decree by arguing that the Sunset Canal Company is not now a corporation and was not a corporation when the suit was instituted in 1925 (Br. 37-39), and that the decree against the company was therefore a nullity (Br. 33). The contention that the Sunset Canal Company ceased to be a corporation cannot be raised by the present appellants, and if raised will be found to be without merit.

1. *The appellants are estopped to deny the corporate existence of the Sunset Canal Company.*—The Sunset

Canal (or Ditch) Company was organized as a corporation under the irrigation laws of New Mexico in 1903 (R. 131, 241). Both the company and its water users (including the appellants) were named as defendants in the 1925 litigation (R. 3-4). The company entered a general appearance and asked for cross relief, as did the appellants and other New Mexico defendants who had water rights under the Sunset Canal (R. 29-45). Neither the company itself nor the individual water users entered any plea that the corporation had become defunct. In fact they affirmatively represented that the canal company was their diverting agent (R. 39). The Sunset Canal Company signed the "stipulation for and consent to" the entry of the 1935 decree, as did its individual water users (R. II, 6 following the decree; *infra*, pp. 71-72). The Canal Company itself installed the measuring devices required by the decree and the court's subsequent orders (R. 138). For three years it abided by the decree and collected the 13¢ assessments from the water users along its ditches (R. 138-139). It issued shares of stock so its individual members might obtain loans from the Federal Land Bank (R. 200). It elected officers regularly, (R. 132, 194-197). And not until the contempt proceedings were instituted in 1939 did its officers or its members raise the contention that the company had ceased to exist in 1921. In the meantime the Government had conducted an expensive litigation to adjudicate water rights; it had loaned money to the individual water users in reliance on shares of stock issued by the company; and it had constructed a dam at a cost of \$5,500,000.00 to impound water for supplemental irriga-

tion of the white- and Indian-owned lands of the San Carlos Project. Act of June 7, 1924, c, 288, 43 Stat. 475.

In view of these facts it is submitted that the appellants and the other users of water from the Sunset Canal are estopped to deny the corporate existence of the Sunset Canal Company. *Tulare Irrigation District v. Shepard*, 185 U. S. 1 (1902); cf. N. M. Stat. Ann. (Comp. 1929), sec. 32-229. A corporation may exist by estoppel. 13 Am. Jur. "Corporations," sec. 63. The appellants and other New Mexico defendants, in order to escape the limitations imposed by the 1935 decree, should not be allowed at this late date to say that the corporation is nonexistent.

2. *The Sunset Canal Company is a de jure corporation.*—Even if appellants are not precluded by their conduct from denying the corporate existence of the Sunset Canal Company and even if such an issue may be raised by private litigants, it is submitted that the Company is an existing corporation. Appellants concede that the company was validly organized in 1903 under the name "Sunset Ditch Company" but contend (Br. 37-39) that it has since been dissolved by virtue of an act which declared that "all private corporations" organized under the laws of the Territory of New Mexico and which have failed to file annual reports, as required by the Act of March 15, 1917, N. M. Laws, 1917, c. 112, sec. 6, "be and the same are hereby declared to be dissolved." Act of June 14, 1921, N. M. Laws 1921, c. 185.

The Canal Company was organized under the Act of February 24, 1887, N. M. Laws 1887, c. 12. The Supreme Court of the Territory of New Mexico in *Albuquerque Land Irrigation Co. v. Gutierrez*, 10 N. M.

177, 250, 61 Pac. 357 (1900), affirmed 188 U. S. 545 (1903), held that corporations organized under the provisions of that act are not private corporations^{but} "quasi public servants."

Hence it is obvious that the 1921 statute relied upon by the appellants to prove the dissolution of the Canal Company can in no way affect its corporate status since it is not a "private corporation" and therefore not subject to dissolution for failure to file annual reports. It therefore continues to exist as a *de jure* corporation.

Even if the Sunset Canal Company lost its franchise in 1921, yet it has been operating since that time as a "community ditch," and was therefore suable in the same manner as a corporation. N. M. Stat. Ann. (Comp. 1929), secs. 151-414 provides:

All community ditches or acequias shall for the purposes of this article be considered as a corporation or bodies corporate, with power to sue or to be sued as such.

Parley P. Jones, the president of the Company, testified that the assessments paid Mr. Firth between 1936 and 1939 "were paid by our community ditch. The source of those funds was common contribution of labor assessments. * * * [The Company] is not a corporate entity. It is a community ditch. It is operated by joint efforts of the community. We collect labor assessments. Everybody in the community contributes" (R. 193). He testified that the residents of the valley, at a regular meeting (R. 196), select a committee of representatives to manage and control it (R. 194) and the committee so selected designates from its own number a president and a secretary (R. 196). The

organization thus described is substantially identical with the community ditch whose organization is provided for in N. M. Stat. Ann. (Comp. 1929) secs. 151-414 through 151-438. For such bodies no charter is required; they are not subject to the jurisdiction of the Corporation Commission; but under the statute such a body is, ipso facto, suable as a corporation. Its members are therefore bound by the 1935 decree. See *In re Dexter-Greenfield Drainage District*, 21 N. M. 286, 304, 154 Pac. 382 (1915).

3. *The Sunset Canal Company is in any event a de facto corporation.*—There was a valid law under which the Sunset Canal Company could have organized. It did organize in 1903 (R. 241). And it has transacted since that date, and continues to transact business as a corporation (R. 131, 143). It therefore meets the three requirements for a *de facto* corporation. *Tulare Irrigation District v. Shepard*, 185 U. S. 1 (1902).

Therefore, whether viewed as a corporation *de jure*, *de facto*, or by estoppel, it is clear that the court below did not err, as appellants contend (Br. 37-39), when it concluded that the Sunset Canal Company in 1935 “was, ever since has been, and now is, a corporation doing business in the states of Arizona and New Mexico” (R. 143).

In short, appellants’ second main contention that successors in interest are not bound by the 1935 decree is not supported by the law nor by the facts: In the first place, appellants are not successors in interest and cannot plead a defense personal to others. In the second place, injunctions may run against and bind successors

in interest. And in the third place, all persons who use water from the ditches of the Sunset Canal Company are bound by the decree determining the diversion rights of that Company, for that Company is an existent corporation which represented the interests of its several members in the 1925-1935 litigation. Inasmuch as successors in interest in New Mexico are bound by the 1935 decree, the court below did not err "in refusing to permit appellants to prove that the court's order and decree were physically impossible of enforcement in New Mexico because one-half of the water rights adjudicated by said decree are now owned and operated by persons who are not parties to this suit" (Br. 42-43).

III

The contempt proceeding itself was free from error

As their third line of attack, appellants in effect argue that even if the original decree was binding on the New Mexico defendants and their successors in interest, the contempt judgment must nevertheless be reversed because of allegedly erroneous rulings and orders in the contempt proceeding itself (Br. 40, 41-42, 44-45, 46-51, 51-53, 53-55). These several objections to the contempt proceeding are without merit.

A. The court did not err in overruling the motion of Parley P. Jones, R. W. Brooks, and Rachel Jensen to quash process and service upon them in New Mexico as officers of the Sunset Canal Company

The Sunset Canal Company, as a body corporate, and Parley P. Jones, R. W. Brooks, and Rachel Jensen, individually, consented to the entry of the 1935 decree (R. II, Stipulation, p. 6 following de-

cree; infra, pp. 71-72). The voluntary submission of the company and the individuals to the entry of the decree in the first instance obviates any doubt that the Sunset Canal Company and the individuals were then subject personally to the jurisdiction of the court. This being true, the obligations which the court imposed upon them personally were binding upon them even outside of Arizona, and the court's jurisdiction continued as to them for all further proceedings involving the enforcement of the decree. *Leman v. Krentler-Arnold Co.*, 284 U. S. 448 (1932); *Aerovox Corporation v. Concourse Electric Co.*, 90 F. 2d 615, 617 (C. C. A. 2, 1937). The quotation which the appellants rely upon (Br. 40) from *Robertson v. Labor Board*, 268 U. S. 619, 622 (1925), has no bearing in this proceeding. There, Robertson had never been subject to the court's jurisdiction and the question was whether he might for the first time be subjected to the jurisdiction by service of process in a different district from that in which the court was located. Here the appellants and the Sunset Canal Company have subjected themselves to the jurisdiction of the court for the entry of the decree, and are bound under the rule of the *Krentler-Arnold* case. The Supreme Court there held (pp. 454-455):

As the proceeding for civil contempt for violation of the injunction should be treated as a part of the main cause, it follows that service of process for the purpose of bringing the respondent within the jurisdiction of the District Court
 * * * was not necessary. The respondent was already subject to the jurisdiction of the court for the purposes of all proceedings that were part of the equity suit and could not escape

it, so as successfully to defy the injunction, by absenting itself from the district. * * *

In this view, nothing more was required in the present case than appropriate notice of the contempt proceeding, and that notice the respondent received.

Process in the contempt proceedings was served on them as individual landowners and also as officers and directors of the Sunset Canal Company (R. 68-69, 76-77). With respect to the appellants in their individual capacity, service upon them, however made, was sufficient to give them notice of the contempt proceeding.

The question whether the service upon Parley P. Jones, R. W. Brooks, and Rachel Jensen as officers or directors of the Sunset Canal Company was sufficient to subject the company to the contempt proceeding is not an issue presented in this appeal, inasmuch as the Sunset Canal Company is not a party to the appeal. It has been seen elsewhere (*supra*, p. 54) that the company submitted itself to the jurisdiction of the court at the time the original decree was entered, and therefore under the doctrine of the *Krentler-Arnold* case remains subject to the jurisdiction of the court below in subsequent proceedings brought to enforce the decree against the Company and its water users. Hence, it is apparent that the court's action in overruling the motion to quash the service upon Parley P. Jones, R. W. Brooks, and Rachel Jensen as officers or directors of the Canal Company has no materiality to the questions involved in this appeal.

It is to be noted that the Sunset Canal Company at the time of the alleged contempt and at the time process

was served upon its officers was doing business in the State of Arizona as well as in the State of New Mexico (R. 143).

B. The appellants are guilty of disobeying the consent decree and of obstructing the execution of the court's orders

Appellants contend they have disobeyed no lawful decree or command of the court (Br. 46-51). The question whether the 1935 decree was lawful has already been discussed (*supra*, pp. 18-54). The question whether the 1935 decree was disobeyed, and in what respects, requires a few additional comments.

The amended petition, sworn to by the court's Water Commissioner, alleged that the respondents had failed to pay the assessment (R. 52), that the Commissioner thereupon closed the main diverting structures and at various times told the respondents not to appropriate or use any of the water of the Gila River (R. 53); but that nevertheless the respondents had appropriated and used such water (R. 53, 55). The present appellants filed an answer in which they did not deny that they had failed to pay the assessment or that the Water Commissioner had told them not to appropriate or use any water from the Gila River, and admitted that they had since January 1, 1939, continued to use the water of the Gila River (R. 86) in contravention of such order.

On the pleadings before the court, therefore, there was an admitted violation of that part of the court's order which stated:

It is further ordered that all expenses of the Water Commissioner herein authorized shall be paid by the landowners and for that purpose

the Water Commissioner is authorized and directed to collect 13¢ for each acre of land for which a water right is given in the decree.
 * * * It is further *ordered that all parties,*
 * * * shall pay their share of the Commissioner's expenses in advance, in two equal installments, * * *. Thereafter, semiannual payments of equal amounts shall be made on the 1st day of January and the 1st day of July, * * * (R. 58-59).

This constituted an order on "all parties" to the decree to pay 13¢ per acre in semiannual installments, and this order was admittedly disobeyed by the appellants.

The decree furthermore had authorized the Water Commissioner to make orders, rules or directions in accordance with and for the enforcement of the decree (R. II, 112; Br. Appx. iv) and he was further ordered "to refuse the delivery of water from the Gila River to any party entitled to divert so long as such diverter remains in default in the payment of any of its share of the said 13¢ per acre" (R. 59). Pursuant to these orders the Commissioner directed each of the appellants not to use or appropriate any water. This direction was clearly for the purpose of implementing the decree. The appellants' continued use of the water in violation of this order constituted contempt of the court, not only in disobeying the authorized orders of the Water Commissioner but also in obstructing the execution of the court's order that the Commissioner refuse delivery of the water to those who had not paid their assessment. *Toledo Co. v. Computing Co.*, 261 U. S. 399 (1923); *Buck v. Raymor Ballroom Co.*, 28 F. Supp. 119 (Mass. 1939).

The decree further enjoined the appellants "from asserting or claiming * * * any right, title or interest in or to the waters of the Gila River, * * * except the right specified, determined and allowed by this decree" (R. II, 113; Br. Appx. vi). The use of the water in violation of the decree and of the orders of the Commissioner constituted a claim of rights beyond the terms of the decree, and was therefore a violation thereof. *South Butte Mining Co. v. Thomas*, 260 Fed. 814, 818 (C. C. A. 9, 1919), certiorari denied, 253 U. S. 486. Nor can they defend their taking on the ground that the diversions in excess of their adjudicated rights were authorized by a New Mexico Commissioner. There is nothing in the laws of New Mexico "requiring a water user to take all the water a commissioner might allow him." *Sain v. Montana Power Co.*, 84 F. 2d 126, 128 (C. C. A. 9, 1936).

Therefore, on the face of the pleadings, there were three admitted violations of the 1935 decree and subsequent orders of the court, namely, a failure to pay the assessments, an appropriation and use of water, and an assertion of water rights beyond the terms of the decree.

The evidence and the court's findings disclose still other violations of the decree and orders of the court. For example, the court's order of December 9, 1935, requires the Water Commissioner to prepare and file with the court "a full and complete report, certified under oath, showing the daily quantity of water distributed to the respective users" for each calendar year (R. 60). The findings show that after the original locks:

and recording devices were broken and destroyed the Sunset Canal Company refused to provide "accurate measuring or automatic recording devices, for the use of the Water Commissioner, as provided for in the order of this Court," and that the company refused to allow him access to their recording gauges, or to furnish him "information as to the amount of water diverted from the Gila River, by said respondent and delivered to the lands under its system during the calendar year 1939," and that as a result the Commissioner was unable to furnish the court or the parties to the decree "an accurate and full report" for 1939 (R. 141-142).

The evidence also shows, and the court below so found (R. 141), that the respondents were contumacious in another particular: they caused the locks in the diverting structures and measuring devices to be broken and other locks to be placed thereon. While it is true that they did not do the actual breaking, it is clear that it was done at their instigation. The record shows that the respondents, represented by H. Vearle Payne, Henry L. Smith, Hugh Pace, Parley P. Jones and Robert Mortensen, went before the Interstate Streams Commission and asked for relief from the 1935 decree (R. 185, 198, 224). The subsequent acts of the New Mexico officials stem from the representations there made (R. 225, 227, 132, 232, 234, 240).

C. The court below did not rule that the burden was upon respondents to prove that they were not guilty of contempt

At the outset of the contempt hearing counsel for the respondents argued that since the decree allegedly violated was a consent decree in the nature of a contract, "the burden of going forward" so as to show that the

decree was equitable rested upon the complainants (R. 167-168). This the court denied, stating that it was "incumbent upon the respondents * * * to show cause to purge themselves of the contempt" and directed them to "proceed" (R. 169). This ruling related only to the problem presented by counsel for the respondents and cannot be interpreted as a broad ruling that on all issues of fact, the burden was upon the respondents to prove that they were not guilty of contempt. It was merely a ruling that the verified affidavits and the order to show cause established a *prima facie* case and placed upon the respondents the "burden of going forward with the evidence," an entirely different thing than imposing upon respondents "the burden of proof."

Even had the court made such a ruling, it was correct since upon the pleadings all the defenses set up by the respondents were affirmative and therefore had to be proved by them. There were, it will be recalled, several admitted violations of the decree (*supra*, pp. 57-59). The defenses set up and relied upon by the appellants were that for various reasons the decree was invalid with respect to New Mexican rights, that because the decree was not binding on subsequent purchasers of land it was unequal in its operation and hence impossible of enforcement. The answer further alleged that the diversion of water from the Gila River in contravention of the decree did not injure any water rights in the State of Arizona.

The allegations of these answers failed as a matter of law to constitute a valid defense (*supra*, pp. 18-54). As the matter stood on the pleadings, therefore, the

respondents had admitted facts which constituted a violation of the decree, and the burden was on them to bring forward any matters which would purge them of contempt. *Oriel v. Russell*, 278 U. S. 358, 366 (1929); *Cutting v. Van Fleet*, 252 Fed. 100 (C. C. A. 9, 1918); *In re Pillsbury*, 69 Cal. App. 784, 788, 232 Pac. 725 (1924). Theirs was the task of proving any matters in confession and avoidance. *In re Cashman*, 168 Fed. 1008 (S. D. N. Y. 1909). The rule in contempt proceedings in this regard is and should be no different from the rule in all other cases whether criminal or civil. Jones, *Evidence* (4th ed., 1938), secs. 179–180, and cases therein cited. Therefore, even had the court ruled that the burden was on the appellants to purge themselves of their admitted violation of the decree, such ruling would have been proper. Furthermore, there was no dispute as to the material facts.

D. The district court properly rejected appellants' offer to prove that the diversion of water in New Mexico did not injure the water users of Arizona

Appellants contend that the court below erred in refusing to admit testimony that the water, had it not been diverted in New Mexico, would have been lost before it reached Arizona (Br. 41–42). The district court rejected the offer (R. 173) as immaterial since the decree had been admittedly violated. This holding is clearly correct for the question of irreparable injury was conclusively adjudicated by the injunction. It is well settled that absence of injury is no defense in a contempt proceeding. *Wyoming v. Colorado*, 309 U. S. 572, 581 (1940); *Red River Valley Brick Corp. v. Grand Forks*, 27 N. D. 431, 440, 146 N. W. 876 (1914);

Herring v. Pugh, 126 N. C. 852, 857, 861, 36 S. E. 287 (1900); *cf. Miller and Lux v. Rickey*, 146 Fed. 574, 575-576 (C. C. Nev. 1906). In *Wyoming v. Colorado*, *supra*, the Supreme Court rejected an indential contention saying (p. 581):

Colorado insists that Wyoming has not been injured. But such a defense is not admissible. After great consideration, this Court fixed the amount of water from the Laramie River and its tributaries to which Colorado was entitled. Colorado is bound by the decree not to permit a greater withdrawal and, if she does, she violates the decree and is not entitled to raise any question as to injury to Wyoming when the latter insists upon her adjudicated rights.

None of the cases cited by appellants (Br. 41-42) are relevant because the question of violation of a court decree in a contempt proceeding was not involved. It is submitted, therefore, that the district court properly rejected this evidence.

E. The fine of \$100.00 imposed on each respondent was proper

On January 11, 1939, the court authorized the Water Commissioner to employ an attorney in connection with the present matter and to advance him \$250.00 for his expenses and \$500.00 as a retainer (Water Commissioner Firth's Report for 1939, p. 1; *infra*, pp. 74-75), and in the same order allowed the Water Commissioner his expenses in connection with the same matters. Subsequently, on September 18, 1939, the court authorized a further advance of \$500.00 to be paid to the attorney, "the ultimate amount of said attorney fee and expenses to be determined by this court" (Water Commissioner Firth's Report for 1939, p. 2; *infra*, p. 75). The Water

Commissioner's financial statement for 1939 shows that pursuant to these orders he had paid John C. Gung'l, attorney, \$1,250.00 and had incurred expenses of \$346.55, totaling \$1,596.55 already spent as a result of the condemnor's violation of the injunction (Water Commissioner Firth's Report for 1939, plate 1; *infra*, p. 75). On March 11, 1940, the court adjudged thirty-four respondents in contempt of court (R. 143), and ordered thirty-three of them to pay a fine of \$100.00 each to be used in defraying "the extraordinary expenses incurred [by the Water Commissioner] in the preparation for and prosecution of respondents in these proceedings; and for such other expenses as the Water Commissioner now has, or may, incur in the administration of said decree" (R. 146).

It is well established that the court in an action for civil contempt may order a fine to be paid to the complainant as compensation for the time spent and attorneys fees and other expenses reasonably incurred in prosecuting the application for contempt. *Toledo Co. v. Computing Co.*, 261 U. S. 399, 428 (1923); *Cary Mfg. Co. v. Acme Flexible Clasp Co.*, 108 Fed. 873 (C. C. A. 2, 1901), writ of error dismissed 187 U. S. 427 (1903); *Feldman v. American Palestine Line*, 18 F. 2d 749 (C. C. A. 2, 1927); *In re Tift*, 11 Fed. 463 (E. D. N. Y. 1881). The amount to be so allowed lies in the discretion of the court and its determination will not be set aside except for abuse of discretion. *Board of Trade of Chicago v. Tucker*, 221 Fed., 305 (C. C. A. 2 1915). Although the *Christensen* case,¹⁴ quoted in the

¹⁴ *Christensen Engineering Co. v. Westinghouse Air Brake Co.*, 135 Fed. 774 (C. C. A. 2, 1905).

appellants' brief (Br. 52-53) held that this determination could be made only upon actual proof of the expenses of litigation, the decision in that case (p. 782) recognized that such a doctrine was not adhered to in other jurisdictions. Moreover, the subsequent case of *Norstrom v. Wahl*, 41 F. 2d 910 (C. C. A. 7, 1930) also cited in the appellants' brief (Br. 53), after discussion and quoting the *Christensen* decision, repudiated its doctrine, stating (p. 914):

In the very nature of things courts should be able to reach a fair conclusion as to the amount of ordinarily necessary costs and attorneys' fees to be awarded in such a case. We believe that in this simple and, to say the least, quite informal proceeding an award to appellee of \$250 for its necessary costs and attorneys' fees incurred in the District Court would be fair compensation.

To the same effect is the decision of this Court in *Union Tool Co. v. United States*, 262 Fed. 431 (C. C. A. 9, 1920).

In the present case the court was particularly able to determine reasonable costs and attorneys' fees since it was fully conversant with the progress of the case and was to determine the ultimate fees and expense to be allowed the Water Commissioner and his attorney. The fact that \$1,596.55 had already been laid out in the preliminary stages of the case indicates that \$3,-300.00 was not an unreasonable figure to allow for the total expenses incurred in prosecuting this contempt application. It is obvious that each of the respondents separately caused over \$100.00 of these expenses. The

cost of bringing separate contempt proceedings against each respondent would not vary substantially with the amount of water wrongfully taken by any one of them. In a joint action against all the respondents it would have been impossible to show which items of the expense involved in the prosecution were allocable to the violations of each person separately. For this reason it was proper for the court to apportion the total expenses equally among all the respondents by imposing on each a fine of \$100.00.

F. The court acted properly in fining the appellants rather than imprisoning them

As set forth *supra* (pp. 57-60) the contempt consisted not only in the respondents' failure to pay the 1939 water assessments but also in taking and using water after the Water Commissioner had shut the locks and ordered them not to use any water, and also in laying claim to water rights in the Gila River over and above those established by the consent decree. Any one of these latter acts were affirmative violations of the decree and warranted the court in imposing a remedial fine for the benefit of the complainant, *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 443-444 (1911).

Even had the contempt lain solely in the appellants' failure to pay the water assessment, however, it was proper for the court to order a remedial fine to reimburse the complainant for his outlay in prosecuting the contempt proceedings. Section 385 of 28 U. S. C. (36 Stat. 1163) provides:

The said courts shall have power * * * to punish, by fine or imprisonment, *at the discretion of the court*, contempts of their authority.

Section 387 of the same title (38 Stat. 738) similarly provides:

If the accused be found guilty, judgment shall be entered accordingly, prescribing the punishment, either by fine or imprisonment, or both, *in the discretion of the court*. Such fine shall be paid to the United States or to the complainant, * * *.

These statutes expressly authorize the court to exercise its choice in selecting the appropriate form of punishment. While in a civil contempt action the punishment must be remedial, either fine or imprisonment, whichever is appropriate to the situation, is available to the court. In *Feldman v. American Palestine Line*, 18 F. 2d 749 (C. C. A. 2, 1927) the court punished a failure to obey a money decree by imposing a fine of \$1,500.00 to reimburse the complainant for his expenses and attorneys' fees incurred in prosecuting the contempt action.

In the present case the appellants' failure to pay the water assessment caused the Water Commissioner substantial expenses of litigation. It is proper that these expenses should be defrayed by the persons responsible for their incurment. The fine will also have the incidental effect of discouraging further failure to pay the assessment.

The fact that this proceeding was being used by the respondents to test the validity of the consent decree made it inadvisable to punish them by the drastic remedy of imprisonment, particularly in view of the likelihood that an appeal would be taken. No contention was made by the respondents during the trial that imprisonment was the sole remedy. In fact counsel

for the respondents made the contention that since this was an action for civil contempt, the only punishment that could be meted out was a compensatory fine (R. 206). While it is the appellees' contention that imprisonment was also an available remedy to enforce the payment of the water assessment, it is clear that the imposition of the compensatory fine was proper under the circumstances.

CONCLUSION

It has been shown that the 1935 decree on which the contempt proceedings were based was valid and binding on the New Mexico defendants and their successors, that the appellants have disobeyed the 1935 decree and the lawful orders issued thereunder, and that the contempt judgment itself is free from error. It is therefore respectfully submitted that the judgment of the court below should be affirmed.

NORMAN M. LITTELL,

Assistant Attorney General.

FRANK E. FLYNN,

United States Attorney,

District of Arizona.

H. S. McCLUSKEY,

VERNON L. WILKINSON,

W. ROBERT KOERNER,

Attorneys, Department of Justice.

GERAINT HUMPHERYS,

District Counsel,

United States Indian Field Service,

JOHN C. GUNG'L,

Of Counsel.

SEPTEMBER 1940

APPENDIX

DECREE

VI

[R. II, p. 86]

That plaintiff has and owns rights in the waters of the Gila River, and in and to the use of said waters, as follows:

*

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(5) [R. II, p. 105] The right, as of the date of priority of not later than June 7, 1924,—and for the purposes of this decree and for them only as of said date—to store the waters of the Gila River in the San Carlos Reservoir of the aforesaid San Carlos Project by means of the Coolidge Dam (said Reservoir and Dam being situate within the San Carlos Indian Reservation) to the extent of the full 1,285,000 acre-feet capacity of said Reservoir at all times when said waters are available above said dam for such storage under the aforesaid priority; and the right in that relation to accomplish and control the release from said reservoir of the waters so stored and thus reduced to ownership, and to conduct the same down the channel of the Gila River to the Ashurst-Hayden and Sacaton diversion dams of the San Carlos Project and there to recapture and divert, and control the diversion of, the same by means of said dams for conveyance in the canals leading therefrom to the above described 100, 546 acres of the lands of said Project for the reclamation and irrigation thereof, and for the supplementation of amounts available therefor at said dams

from the natural stream flow under plaintiff's rights as same are decreed herein, and for State and Federal purposes under act of March 7, 1928 as hereinbefore described.

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XI

[R. II, p. 112] That the lands within the Gila River watershed for the irrigation of which rights are decreed herein are arid or semi-arid in character and require irrigation in order that crops of value may be produced thereon; that except as herein specifically provided no diversion of water from the natural flow of the stream into any ditch or canal for direct conveyance to the lands shall be permitted as against any of the parties herein except in such amount as shall be actually and reasonably necessary for the beneficial use for which the right of diversion is determined and established by this Decree, to wit: shall be made only at such times as the water is needed upon their lands and only in such amounts as may be required under the provisions hereof for the number of acres then being irrigated; that in cases where by this Decree water is allowed to be diverted by and through any ditch by the owner thereof for another party, the terms of the contractual relations existing between them are not intended to be determined herein; that wherever the total area under a particular canal is decreed more than one water right, each having the same or different priorities or in its different parts having different rights and priorities, the total area may have used upon it all of its several rights in the order of their priorities, subject only to the requirement that no greater net draft on the stream be made than if each right in the order of its priority were used only on the particular lands for which it was originally acquired or reserved; * * *

[R. II, p. 1 following decree]

STIPULATION FOR AND CONSENT TO THE ENTRY OF A FINAL DECREE IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA IN, THE CASE OF UNITED STATES OF AMERICA *v.* GILA VALLEY IRRIGATION DISTRICT, ET AL.

Come now the parties hereto, either in person or by their solicitors, and inform the Court that they have reached a settlement of the issues in this cause and have adjusted and settled their respective claims as between each other; that they have set up in the within and foregoing decree the respective rights of all parties hereto, and request the Court to adopt said decree as its finding herein and that it be entered as its final decree in this cause, settling and adjudicating the rights of the parties hereto.

For the United States of America,

HOMER CUMMINGS,

The Attorney General.

HAROLD L. ICKES,

The Secretary of the Interior.

CLIFTON MATHEWS, F. E. FLYNN,

Clifton Mathews, Esq.,

United States Attorney,

Solicitors for the plaintiff.

June 24, 1935.—April 11, 1935.

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*

[R. 2, pp. 6-7 following decree]

H. A. ELLIOTT, by A. R. LYNCH,

A. R. LYNCH,

H. A. Elliott and A. R. Lynch, Solicitors for
the following defendants: * * *

R. W. Brooks; * * * Carl M. Don-

aldson; * * * Byron Echols;
 * * * B. J. Gale; * * * G. Lynn
 Hatch; * * * Rachel Jensen; R. T.
 Johns; * * * John B. Jones; Mary
 Jane Jones; Parley P. Jones; T. V. Jones;
 Willard E. Jones; * * * Anna H.
 Lunt; * * * P. L. Lunt; * * *
 Fenley F. Merrill; Orson A. Merrill;
 * * * Hans Mortensen; * * *
 Nancy O. Pace; * * * E. C. Payne;
 * * * Junius E. Payne; Leslie B.
 Payne; * * * Ralph Richardson;
 * * * Orson J. Richens; * * *
 School District No. 2, County of Hidalgo,
 State of New Mexico; * * * Henry
 L. Smith; * * * Florence R. Swof-
 ford; Sunset Canal Company; * * *
 B. Y. Whipple; * * * J. E. Payne,
 Trustee, Church of Jesus Christ of Latter
 Day Saints; * * * Milton N. Jensen;
 * * * Maude Larsen; * * * R.
 Richens; * * * Nancy A. Smith; and
 E. Thygersen.

FOURTH ANNUAL REPORT

Distribution of Waters of the Gila River by C. A. Firth, Gila Water Commissioner to the United States District Court in and for the District of Arizona, 1939

LETTER OF TRANSMITTAL

SAFFORD, ARIZONA, *February 12, 1940.*

No. E-59—Globe

RE: UNITED STATES OF AMERICA VS. GILA VALLEY IRR.
DISTRICT

Honorable ALBERT M. SAMES,

Judge, United States District Court, Tucson, Arizona.

DEAR SIR: I submit herewith the Fourth Annual Report in the above cause on distribution of waters of the Gila River, tabulations of hydrometric data, and analysis of expenditures for the calendar year 1939.

Very truly yours,

(S) C. A. FIRTH,
C. A. Firth,

Gila Water Commissioner.

STATE OF ARIZONA
County of Graham, ss.

I, C. A. Firth, Gila Water Commissioner, hereby certify that the following is a true and correct record of distribution of waters of the Gila River for the calendar year 1939, to the best of my knowledge and belief; furthermore, that the Financial Statement submitted herein is a true and accurate record of all receipts and disbursements for the calendar year 1939.

(Signed) C. A. FIRTH.

Subscribed and sworn to before me this 12th day of February 1940.

[SEAL]

(Signed) MIRTRUE HOLMAN,
Notary Public.

My commission expires February 27, 1940.

AUTHORITY

[Report, p. 1]

In the District Court of the United States in and for
the District of Arizona

THE UNITED STATES OF AMERICA

vs.

GILA VALLEY IRRIGATION DISTRICT, ET AL.

No. E-59-Globe

ORDER AUTHORIZING EXPENSES

A petition having been heretofore filed in this cause by Charles A. Firth, Water Commissioner, praying an order of this court for permission to employ an attorney to advise him as to his rights as such commissioner under said decree relative to New Mexico State Officials taking possession of the distribution of the waters of the Gila River in New Mexico, and such other advice as he may require from time to time in relation to the interpretation of said decree relative to his duties as such water commissioner, and until the further order of this court, the said appointment to date from January 2, 1939, and for additional expenses of said water commissioner as set forth in said petition; and it appearing to the Court that it is necessary and proper that said commissioner be authorized to incur said expenses for the purposes set forth in said petition;

IT IS THEREFORE ORDERED, ADJUDGED and DECREED that said Water Commissioner be and is hereby authorized to employ said Attorney for said purposes and to advance said attorney the sum of \$250.00 for his expenses in connection with said matters and the sum of \$500.00 as a retainer, the ultimate amount of said attorney fee for said services to be determined by this Court. It is further ordered that said Charles A. Firth, Water Commissioner, be allowed his expenses in connection with the above matters in addition to the allowance for his expenses heretofore made by this Court.

(Signed) ALBERT M. SAMES,
*Judge, United States District
 Court for the District of Arizona.*

Dated Tucson, Arizona, January 11, 1939.

EXCERPT OF COURT ORDER OF SEPTEMBER 18, 1939

[Report, p. 2]

The Court authorized * * * \$250.00 expenses and \$250.00 retainer to be paid attorney as advance, * * * the ultimate amount of said attorney fee and expenses to be determined by this Court.

FINANCIAL STATEMENT FOR 1939

[Report, Plate 1]

* * * * *

DISBURSEMENTS

* * * * *

John C. Gung'l, Attorney (U. S. Court Order 1/[11]/39 & 8/18/39) :

Retainer -----	\$750. 00
Expenses -----	500. 00

1, 250. 00

C. A. Firth, Special Expense (Court Order 1/11/39) -----	346. 55
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No. 9544

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

R. W. BROOKS, CARL M. DONALDSON, BYRON
ECHOLS, B. J. GALE, G. LYNN HATCH,
RACHEL JENSEN, MILTON N. JENSEN, R.
T. JOHNS, WILLARD E. JONES, JOHN B.
JONES, PARLEY P. JONES, T. V. JONES,
P. L. LUNT, FENLEY F. MERRILL, ORSON
A. MERRILL, HANS MORTENSEN, LESLIE B.
PAYNE, ORSON J. RICHENS, HENRY L.
SMITH, FLORENCE R. SWOFFORD, MARY
JANE JONES, ANNA H. LUNT, NANCY O.
PACE, JUNIUS E. PAYNE, J. E. PAYNE,
Trustee of the Church of Jesus Christ
of Latter Day Saints, E. C. PAYNE,
RALPH RICHARDSON, R. RICHENS, NANCY
A. SMITH, E. THYGERSON, and B. Y.
WHIPPLE,

Appellants,

VS.

UNITED STATES OF AMERICA and C. A. FIRTH,
Appellees.

Upon Appeal from the District Court of the United States
for the District of Arizona.

REPLY BRIEF FOR APPELLANTS.

M. C. MECHEM,

A. T. HANNETT,

First National Bank Building, Albuquerque, New Mexico.

Attorneys for Appellants.

H. VEARLE PAYNE,

L. P. McHALFFEY,

Lordsburg, New Mexico,

Of Counsel.

FILED

OCT 17 1940

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No. 9544

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

R. W. BROOKS, CARL M. DONALDSON, BYRON
ECHOLS, B. J. GALE, G. LYNN HATCH,
RACHEL JENSEN, MILTON N. JENSEN, R.
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P. L. LUNT, FENLEY F. MERRILL, ORSON
A. MERRILL, HANS MORTENSEN, LESLIE B.
PAYNE, ORSON J. RICHENS, HENRY L.
SMITH, FLORENCE R. SWOFFORD, MARY
JANE JONES, ANNA H. LUNT, NANCY O.
PACE, JUNIUS E. PAYNE, J. E. PAYNE,
Trustee of the Church of Jesus Christ
of Latter Day Saints, E. C. PAYNE,
RALPH RICHARDSON, R. RICHENS, NANCY
A. SMITH, E. THYGERSON, and B. Y.
WHIPPLE,

Appellants,

VS.

UNITED STATES OF AMERICA and C. A. FIRTH,
Appellees.

Upon Appeal from the District Court of the United States
for the District of Arizona.

REPLY BRIEF FOR APPELLANTS.

The appellants contend that this was an action to quiet title to real estate and in so far as they and their lands and water rights situated in New Mexico are concerned the decree is wholly null and void.

If this court so determines, all the other questions presented and argued will not be considered by this court.

If, however, this court should rule that this was a suit in tort to obtain an injunction to restrain appellants from diverting the waters of the Gila River in New Mexico to the prejudice of the United States, then whether New Mexico is an indispensable party and the validity of the orders of the court become pertinent.

I.

THIS WAS A SUIT TO QUIET TITLE AND AS FAR AS IT AFFECTS WATER RIGHTS IN NEW MEXICO THE DECREE IS VOID.

Replying to appellees' arguments under paragraph A, page 19 of their brief, we submit the following observations:

At pages 36 and 37 of their brief, appellees state:

"Largely because of this Court's trail-blazing decisions in the *Miller & Lux* and the *Salton Sea Cases*, Professor Beale in 1913 observed that 'the federal courts show a tendency to transcend state lines in the exercise of equity jurisdiction'."

* * * * *

"Since no single court has physical jurisdiction of the entire Gila River, justice can be done by

having all rights determined and enforced by one court. If, in order to accomplish that end, affirmative but lawful acts must be done abroad, there is no reason why their performance should not be ordered.”

The Supreme Court of the United States is the only court which has physical jurisdiction of the entire Gila River.

The *Miller & Lux* and *Salton Sea Cases* did not “blaze a new trail” extending territorial jurisdiction of federal courts of equity beyond state lines. In each of these cases the federal district court obtained personal jurisdiction over the defendants.

In the *Salton Sea Cases* the suit was originally filed in the State Court of California and removed to the federal court. If the case had remained in the state court the state court’s territorial jurisdiction would have been identical with the district federal court’s jurisdiction, and its jurisdiction *in personam* over the parties would have been identical.

Federal district courts have no more power to decide water rights on interstate streams than have state courts. The United States by its complaint in the case at bar sought to quiet title to water rights in New Mexico as to the first ten miles of the Gila River east of the New Mexico-Arizona line. (R. 23.) The Gila River runs many miles above the Virden Valley and runs through the Counties of Catron, Hidalgo and Grant, a fact which the maps disclose and of which fact this court will take judicial notice.

If suit were brought now by the United States in behalf of its Indian wards, or if suit were brought by any person or corporation in the United States District Court for the District of Arizona against an up-stream water user in New Mexico beyond the ten-mile limit covered by the decree in this case to restrain such up-stream user from tortious use of the water belonging to the United States or an Arizona user, or to quiet title or affect the title of the up-stream users in New Mexico, the United States District Court would be without jurisdiction to hear or determine the case; nor could the defendants by process be brought before the court *in personam* unless the New Mexico up-stream defendant came in and voluntarily submitted himself to the jurisdiction of the court or was served with process in Arizona. Such submission on the part of the up-stream user would submit himself to a judgment *in personam*. He could not confer jurisdiction of the *res* on the court beyond its territorial limits.

Instead of blazing a new trail, this court in the *Miller and Lux* and *Salton Sea Cases* followed a well traveled road. The decision of this court in the *Salton Sea Cases*, 172 Fed. 792-816, gives an authoritative interpretation of the effect of the *Miller and Lux* decree. This court said:

“In *Miller & Lux v. Riekey* (C. C.) 127 Fed. 573, the action was brought in the Circuit Court for the District of Nevada to restrain the defendants from the wrongful diversion of the waters naturally flowing down the stream of both forks of the Walker river having their source in Cali-

fornia, and flowing down into and through the state of Nevada, where the lands of the complainant were situated. The alleged diversion was in the state of California, and the injury caused by such diversion was in the state of Nevada. It was contended on behalf of the defendant that the Circuit Court in Nevada was without jurisdiction, first, because the suit was of a local nature, and could not be brought outside of the state of California; second, because the water right in controversy was in California; third, because the wrongs and injury alleged to have been committed by the defendant were committed wholly in the state of California; fourth, that complete relief could not be decreed by the Nevada court in favor of the complainant and without reaching the property rights of the defendant which were situated wholly in California. Judge Hawley in an elaborate opinion considered the question of jurisdiction as presented by these objections, and reviewed the authorities upon the subject, meeting and answering the objection raised and urged by the defendants in this case that the court could not send its process to execute its decree into foreign territory. The court says on page 580:

“That this court has jurisdiction over the person of the defendant is unquestioned. It can reach him by injunction, and punish him for contempt if he violates it. This doctrine had its foundation in the equity courts of England at an early day”—citing the case of *Penn v. Lord Baltimore*, 1 Ves. Sr. 443, 454; 27 Eng. Rep. 1132, 1139, decided in 1750, where Lord Chancellor Hardwicke said:

“As to the court’s not enforcing the execution of their judgment, if they could not at all, I agree

it would be in vain to make a decree, and that the court cannot enforce their own decree in rem in the present case. But that is not an objection against making a decree in the cause, for the strict primary decree in this court as a court of equity is in personam. * * * In the case of Lord Anglesey of land lying in Ireland I decreed for distinguishing and settling the parts of the estate, though impossible to enforce that decree in rem; but, the party being in England, I could enforce it by process of contempt in personam and sequestration, which is the proper jurisdiction of this court.'

"The court accordingly maintained its jurisdiction of the action, and on appeal to this court the question was fully considered and the jurisdiction of the Circuit Court sustained. *Rickey Land & Cattle Co. v. Miller & Lux*, 152 Fed. 11, 81 C. C. A. 207. It may be further stated that in *Massie v. Watts*, 6 Cranch, 148, 157, 3 L. ed. 181, Chief Justice Marshall cited the case of *Penn v. Lord Baltimore*, and made the same application of the doctrine of jurisdiction of courts of equity as was made by Judge Hawley in *Miller & Lux v. Rickey*. We are of the opinion, therefore, that the court had jurisdiction in the present case to protect property within its jurisdiction, and to restrain the defendant from diverting the waters of the Colorado river to the damage of such property, notwithstanding the defendant may find it necessary in complying with the decree of the court to perform acts beyond the jurisdiction of the court."

This was a suit to quiet title to water rights in New Mexico and not a "suit in tort to obtain an injunction

restraining" defendants from diverting the waters of the Gila River in New Mexico to plaintiff's prejudice.

II.

THE DISTRICT COURT HAD NO POWER TO ENFORCE ITS DECREE THROUGH ITS WATER COMMISSIONER; IT COULD ONLY DO SO THROUGH COERCION OF THE DEFENDANTS.

At page 35 of their brief, paragraph B, appellees say:

"B. The federal district court had jurisdiction * * * to appoint a commissioner to see that the provisions of the decree were respected by the water users in New Mexico."

But the court went much further. It appointed a commissioner to enforce a decree in New Mexico, and the Commissioner took over the control of the ditches in New Mexico, took over the possession of the keys to the measuring devices, turned the water on or off according to his interpretation of the decree, and retained possession and control of the ditches and measuring devices in New Mexico until he was relieved of the responsibilities by the New Mexico authorities.

But these directions in the court's decree and order were not "directions of the court operating *in personam*", but operated directly upon the *res*. *Vineyard Land and Stock Co. v. Twin Falls S. R. L. & W. Co.*, 245 Fed. 9-25 (9th Cir.).

The decree provides "that a water commissioner shall be appointed by the court to carry out and en-

force the provisions of this decree, and the instructions and orders of the court, * * * that the term of employment, expenses and compensation of said water commissioner and his assistants, the payment thereof and the means and methods for securing funds with which to pay the same shall be fixed by orders which the court may hereafter from time to time make; * * *.” (Decree, paragraph XII, page iv Appendix, Appellants’ original brief.)

The decree makes no distinction between the ditches and waters in Arizona and in New Mexico. While the *res* in Arizona was within the territorial jurisdiction of the court, the *res* in New Mexico was not. All of the acts of the water commissioner performed by him in New Mexico were duties personal to the defendants, except that for the protection of the plaintiff the measuring devices were subject to the inspection of the plaintiffs or a water commissioner.

These appellants are charged with the offense of failing to pay their share of the 13¢ per acre levied upon all the lands covered by the decree for the payment of the salary and expenses of the water commissioner in enforcing and carrying out the court’s decree. As the court did not have jurisdiction to enforce and carry out the decree and orders of the court pursuant thereto, except through its coercion of the defendants, it did not have jurisdiction to make the defendants pay for the services of the water commissioner in doing something the court had no jurisdiction to authorize him to do.

III.

NEW MEXICO IS AN INDISPENSABLE PARTY
TO THIS PROCEEDING.

Replying to appellees' argument, paragraph C, page 38 et seq. of their brief, appellants contend that although New Mexico may not have been an indispensable party to the decree at the time it was entered, it is an indispensable party to the enforcement of the court's order of December 9, 1935 (R. 57), for the reason that New Mexico has taken over the distribution of the waters of the Gila River in the Virden District so that it is impossible for the appellants to obey the order of the court.

This court, in *Vineyard Land and Stock Co. v. Twin Falls Oakley L. & W. Co.*, 245 Fed. 30-35, said:

"The question pertaining to interstate waters is also disposed of in case No. 2885. This has direct bearing on the controversy presented by the amendment to the answer, that there is a defect of parties. The purpose of the suit is to quiet title to plaintiff's water rights in Idaho. The court is without jurisdiction to settle water rights in Nevada. No complaint is made that parties other than the defendants are attempting to interfere with plaintiffs' acquired water rights in Idaho, and there can be no cause for injunction against others than the defendants until attempted interference is shown. If there are any others who have rights superior to plaintiffs' not parties to the suit, of course their rights cannot be precluded by the decree herein. They may yet assert such rights, but they are not necessary parties to this suit, not having attempted to assert them to the impairment of plaintiffs' contention."

If New Mexico's acts are illegal their illegality cannot be determined in this proceeding, nor can those acts be nullified or prohibited by any order of the Arizona court.

It is said that the appellants have brought this condition about. The record shows that only one of the whole number of appellants complained to the New Mexico authorities, and as to those who did not complain no act on their part is shown except that they used the water when and as the same was distributed to them by the New Mexico water master. Whether they knew that the water so distributed to them was in excess of that decreed to them is not shown and cannot be presumed.

Until New Mexico's interference with the court's commissioner ceases, how can appellants obey the latter's orders, or the court's orders?

This fact was before the court and it is appellants' position that the court then was apprised of the fact that its commissioner could no longer control the waters of the Gila River in New Mexico.

In the cases cited by appellees where the interest of the upper state was suggested, in none of them had the upper state refused permission to the court's commissioner to enforce the court's decree or orders, or ousted the water users from control of their diverting structures.

In this case the commissioner had taken over the administration of the Sunset Ditch from the water users and thereafter the New Mexico authorities re-

lieved the court's commissioner from further control of the ditch.

So far as appellants are concerned, they did not control or operate the Sunset Ditch after the commissioner assumed control. All they did was to pay their acreage assessment to the Sunset Canal Company who, in turn, paid Firth, the Commissioner. This they failed to do after New Mexico ousted Firth.

If it had appeared to the court when the final decree was entered that New Mexico was in possession of and administering the Sunset Ditch, it is not conceivable that the court would have directed its commissioner to take charge of the ditch. It is the established practice of federal courts of equity to dismiss the plaintiff's bill either at the trial or in the appellate court whenever it appears that an indispensable party is not before the court. The rule will be enforced even though the question is not raised by the pleadings or suggested by counsel, and the parties cannot waive the question nor by consent confer any right on the court to proceed to a decree or order.

Minnesota v. Hitchcock (1902), 185 U. S. 376, 382;

Coiron v. Millandon, 60 U. S. (19 How.) 113.

IV.

THE DECREE AND ORDERS IN THIS SUIT ARE NOT BINDING ON THE DEFENDANTS' "ASSIGNS AND SUCCESSORS IN INTEREST" IN THE WATER RIGHTS IN NEW MEXICO FOR THE REASON THAT IT IS A DECREE *IN REM* AND HAS NO FORCE OR EFFECT.

Appellees argue that as the Sunset Canal Company was a party to this suit it stood in judgment for the water users under the Sunset Ditch in New Mexico. Passing the fact that the Canal Company had been dissolved prior to the entry of the decree and could not sue or be sued, this statement might be true if the United States District Court in Arizona had jurisdiction of the *res* in New Mexico.

If this is a suit *in rem* the decree has no efficacy in New Mexico for any purpose. *Fall v. Eastin*, 215 U. S. 1, 54 L. Ed. 65.

If the decree is *in personam*, it does not affect title to water rights in New Mexico and is not binding upon defendants' assigns or successors in interest to water rights in the latter state.

In *Montezuma Co. v. Smithville Co.*, 218 U. S. 371, 54 L. Ed. 1074, the court had jurisdiction of the *res* affected. The water rights adjudicated were all in Arizona.

V.

THE SUNSET CANAL COMPANY HAD BEEN DISSOLVED WHEN ITS APPEARANCE WAS ENTERED AS A DEFENDANT IN THIS SUIT AND THE DECREE AGAINST IT WAS A NULLITY.

At pages 47-53 inclusive, the appellees argue that because the Sunset Canal Company was a party defendant to the consent decree that the successors in title to the original defendants are bound by the decree because the Canal Company represented and stood in judgment for the water users under the canal.

Reversing the order in which they argue this point, we will call the court's attention to the fact that

A. The Sunset Canal Company was dissolved in 1921 prior to the filing of this cause.

As we pointed out in our previous brief, the Sunset Ditch Company was dissolved under the Act of June 14, 1921, New Mexico Session Laws, Chapter 185, to which the appellees reply that the act applies to private corporations only and that as the Canal Company was organized under an act of the territory of New Mexico which, by decision of the Supreme Court of the United States, was held to be a quasi public corporation, it does not come within the act. It seems, however, that quasi public corporations are private corporations. 13 *Am. Juris.*, Sec. 18, p. 173.

B. That the Sunset Ditch Company was not and never has been a *de facto* corporation.

The Sunset Ditch Company could not in any event be a *de facto* corporation. The Sunset Ditch

Company, having attained full status as a corporation, could not thereafter become a *de facto* corporation.

“It is essential to the existence of a *de facto* corporation that there be (1) a valid law under which the corporation with the power assumed might be incorporated; (2) a bona fide attempt to organize a corporation under the law; and (3) an actual exercise of corporate powers.” 13 *Am. Juris.* p. 195.

The Sunset Ditch Company was a *de jure* corporation from the date of receiving its charter up until the date it was dissolved. Whereupon it became *civiliter mortuus*.

“Nor can a *de jure* corporation, the charter of which has been forfeited and the powers and functions of which have been suspended continue to function as a *de facto* corporation so as to give validity to its acts and contracts entered into during the period of its forfeited charter and suspended powers.” 13 *Am. Juris.*, Sec. 51, p. 196.

C. That the Sunset Ditch Company was not and could never have been a community ditch.

Appellees at page 52 of their brief assert that even if the Sunset Ditch Company lost its franchise in 1921 yet it has been operating since that time as a community ditch and is therefore suable under Section 151-414, New Mexico Statutes Annotated, Compilation of 1929.

Community ditches in New Mexico are defined by Section 151-426 of the 1929 Compilation as follows:

“The provisions of these sections shall apply only to such ditches as have been heretofore and are now known and regarded as community ditches, under the laws of this state; and under the provisions of said sections, shall be construed to mean such ditches as are not private, and such as are not incorporated under the laws of this state or of some other state or territory, and are held and owned by more than two owners as tenants in common, or joint tenants.” (Sec. 8, Chap. 1, Session Laws 1895.)

The Articles of Incorporation of the Sunset Ditch Company (R. 241) show that the Sunset Ditch Company was not in existence in 1895, was not a public ditch, and was incorporated under the laws of the Territory of New Mexico, so that it appears conclusively that it was not a community ditch.

Even if the Sunset Canal or Ditch Company is a community ditch, such corporation could not represent water users or members of the community under the ditch in a suit to quiet title, as claimed by appellees in their brief at pages 48 et seq.

In the case of *Snow v. Abalos*, 18 N. M. 681, 695, 140 Pac. 1044, 1049, 1050, the Supreme Court of the State of New Mexico held that the landowner served by a community ditch is a “necessary party in an action for an adjudication of a water right

where such water rights are exercised through a community ditch”.

“Such being the case, we are of opinion, that prior to the enactment of the statute of 1895, *supra*, making such community acequias corporations, for certain purposes, each individual water user under a community acequia was the owner of a right to take water from the public stream or source from which it was drawn, which right was divorced from and *independent of the right enjoyed by his co-consumer*; that the fact that such water was diverted into a ditch, owned in common with other water users, did not give such other users any interest in, or control over, the right to take water, or water right, which each individual consumer possessed; that the right to divert water, or the water right, is appurtenant to specified lands, and inheres in the owner of the land; that the right is a several right, owned and exercised by the individual, and, the officers of the community acequia, in diverting the water act only as the agents of the appropriator.

* * * * *

“The ditch is simply the carrier or agency employed by the parties, to conduct the water, the right to which is appurtenant to the land, to be irrigated.”

This ruling was upheld and recognized in *La Luz Community Ditch v. Town of Alamogordo*, 34 N. M. 134, 135, 279 Pac. 72, 76. The latter case was not an action to quiet title but was brought by the parties to secure construction of a decree

rendered in a suit to quiet title in which all of the individual appropriators were parties.

Appellees at page 63 of their brief refer to the case of *In re: Dexter-Greenfield Drainage District*, 21 N. M. 286, 304, 154 Pac. 382. The corporation therein referred to was a quasi-municipal corporation, the proceedings for the organization of which are initiated by the filing of a petition in the district court for the creation of the district and the assessment of the costs of construction upon the various owners of property in proportion to the benefits to their properties from the proposed improvements. It has no bearing upon any issue raised here.

Reference is made to page 1 of the Appendix of this brief in which we set forth the title of Chapter 84 of the Laws of 1912 and Section 11 thereof, which clearly show that such a drainage district as that referred to *In re: Dexter Greenfield Drainage District, supra*, is not an irrigation district nor an irrigation company.

D. The Sunset Canal Company is not a corporation by estoppel.

The Sunset Ditch Company is not a *de facto* corporation, a *de jure* corporation, nor does the doctrine of estoppel apply because it is a dissolved corporation, dissolved before the complaint was filed in the original suit, and dissolved before the entry of appearance in the original suit. Neither it, nor any person or attorney in its behalf, had

the power to appear for it. *Standifer Construction Corporation v. Commissioners of Internal Revenue*, 78 Fed. (2d) 285 (9th Cir.).

VI.

THE DISTRICT COURT CANNOT ENFORCE ITS DECREE AND ORDERS IN NEW MEXICO UNDER PRESENT CONDITIONS.

Since the entry of the decree half of the lands and water rights in New Mexico described in the decree have passed into the hands of parties who are not parties to the decree or to this proceeding.

Also since the entry of the decree the State of New Mexico has assumed control of the Sunset Canal preventing the water commissioner from enforcing, or the appellants from operating, the ditch in obedience to the court's decree.

The appellants offered to prove that as fifty per cent of the landowners under the ditch were free to take water as and when they wished it, that it was impracticable to administer the waters of the Gila River in the Virden District in obedience to the decree. This offer on the part of the appellants was denied and exception taken. (R. 175-176.)

In the five years that have elapsed since the entry of the decree fifty per cent of the then defendants have died or sold out. At the same rate in five years more none of the parties to the original suit will be amenable to the orders of the District Court of Arizona.

If appellants can show that it is impracticable to operate the ditch in obedience to the court's decree under these changed conditions, the court will not punish the appellants for contempt or continue its order in effect. 12 *Am. Juris.* p. 438.

It is certain that the decree against the New Mexico water users in the Virden District would never have been entered if it had appeared to the court that in that district half of the water users had not been made parties to the suit, and it is certain that appellants are not responsible for the change in conditions.

Appellees say in their reply that these successors in title are bound by the decree, but they do not point out how the decree can be enforced as to them or how the water commissioner can compel the enforcement of the decree as to them unless, of course, they will voluntarily submit themselves to the jurisdiction of the court.

No presumption can be indulged in, as asserted at page 39 of appellees' brief, as to the future course of any governor of any state, except that he will be jealous of the protection of the state's sovereignty and its waters.

Nor do appellees point out how the court can take away the administration of the river from the state authorities in New Mexico. The Governor of New Mexico (R. 225) found from the evidence before him that the Water Commissioner, C. A. Firth, "was invading the sovereign proprietary interests of the waters of said stream in the State of New Mexico".

In *Bean v. Morris*, 221 U. S. 485-488, the Supreme Court of the United States said:

“It follows from what we have said that it is unnecessary to consider what limits there may be to the powers of an upper state if it should seek to do all that it could. The grounds upon which such limitations should stand are referred to in *Rickey Land and Cattle Company v. Miller & Lux*.”

In the instant case the upper state, New Mexico, has resorted to its police power to protect what it conceives to be an invasion of its sovereign interests in the waters of the Gila River in New Mexico. It obviously seeks to exercise whatever powers it has as referred to by Mr. Justice Holmes in *Bean v. Morris*, *supra*.

“The jurisdiction over the land in rem is in the sovereign of the situs, and cannot be asserted by any other sovereign.” *Beale on Conflict of Laws*, Vol. 1, p. 426, citing *Hart v. Sansom*, 110 U. S. 151.

“A water right is ‘real property’.” *New Mexico Products Co. v. New Mexico Power Co.*, 42 N. M. 311-321, 77 Pac. (2d) 634.

“In order to make a partition the court must invade by its officers the soil of another state and divide up and allot its lands to suit the views of a foreign jurisdiction. This cannot be done.” *Beale on Conflict of Laws*, Vol. 1, p. 425, quoting *Wimer v. Wimer*, 82 Va. 890.

That is Firth’s function under the decree in the instant case, to take physical possession of, and partition, the water among the Virden users.

VII.

THE COURT ERRED IN OVERRULING THE MOTION OF PARLEY P. JONES, R. W. BROOKS AND RACHEL JENSEN TO QUASH PROCESS AND SERVICE UPON THEM IN NEW MEXICO AS OFFICERS OF SUNSET CANAL COMPANY.

At page 54 of their brief, appellees raise the question that as Jones, Brooks and Jensen were already before the court, having entered their appearance in the original suit, that it was not necessary to summon them in this proceeding as officers of the Sunset Canal Company.

However, we insist that the court erred in overruling their motion to quash process and service upon them.

Process was served outside of Arizona and the corporation had been dissolved.

VIII.

THE FINE OF \$100 IMPOSED ON EACH RESPONDENT WAS IMPROPER.

At page 63 et seq. of the appellees' brief, the statement is made that the court authorized the Commissioner to employ an attorney in the present matter, and that his fees and expenses and the expenses of the water commissioner were fixed in this matter at a total of \$1596.55. There was no competent evidence supporting this statement before this court. The Water Commissioner's report was admitted in evidence over the objection of the appellant. (R. 202-

203.) The appellants had no opportunity to cross-examine Mr. Firth on the contents of such report.

The order relied on to establish this sum as attorneys' fees and commissioner's expense is found at pages 74-75 appellees' brief (part of Firth three volume report), and reads, in part:

“* * * to employ an attorney to advise him as to his rights as such commissioner under said decree relative to New Mexico State Officials taking possession of the distribution of the waters of the Gila River in New Mexico, *and such other advice as he may require from time to time in relation to the interpretation of said decree relative to his duties as such water commissioner* * * *”

Appellants were denied the opportunity to cross-examine.

The court's judgment reads, so far as material:

“It is Further Ordered and Adjudged that the aforesaid sum of \$100.00 be paid by each of said respondents forthwith to the Clerk of this Court, for the use of said Water Commissioner, C. A. Firth, to be used by him to pay the extraordinary expenses incurred by him in the preparation for and prosecution of respondents in these proceedings; *and for such other expenses as the Water Commissioner now has, or may, incur in the administration of said decree.*”

Appellees contend that all of this sum was for attorneys' fees and expenses in prosecuting this proceeding in contempt. How much of it was for “such other advice as he may require from time to time in relation

to the interpretation of said decree relative to his duties as such water commissioner", and how much of it was for "such other expense as the water commissioner now has, or may, incur in the administration of the said decree" does not appear, nor did appellants have opportunity to cross-examine on the subject.

It is also contended by appellees that it is obvious that each of the respondents separately caused over \$100.00 of these expenses. It is not apparent from the record, with the exception of Parley P. Jones (assuming he inspired, directed and controlled the Governor of the State of New Mexico), that any appellant caused the expenditures of any money.

The total expense as shown by the evidence was \$1596.55, part of which was for items of expense not involved in this prosecution. Instead of fining each appellant his proportionate share of \$1596.55, which would have been \$51.50 each, the thirty-three persons who were respondents in this proceeding were fined \$100.00 each, or a total of \$3300.00. These fines exceeding as they do any indemnity to which appellees were entitled, as shown by the evidence, were purely punitive.

The judgment was arrived at by conjecture as to future expenses to be incurred, and not based on evidence as to actual loss as a result of the violation of any order of the court in this proceeding. *Christensen Engineering Co. v. Westinghouse Air Brake Co.* (2 Cir.), 135 Fed. 774-782; *Norstrom v. Wahl*, 41 Fed. (2d) 910, 913 (6 Cir.).

The court fined all the respondents the same sum. The appellant Nancy O. Pace is an invalid, eighty years of age, the owner of land and water rights under the Sunset Ditch, but did not use water. She had leased her land to H. M. Pace who did use water. Mary Jane Jones did not use water, but lived with her children. She owned only a town lot in the municipality of Virden comprising 1.1 acre in area, the water being delivered to her lot by the ditch rider of the Town of Virden. (R. 183.) The Town of Virden was not a party to these proceedings.

Can it be said that Nancy O. Pace and Mary Jane Jones who did not use water should pay the same amount as one of the large landowners who did apply water to his lands?

Had the appellants not used the water that they did during the year 1939, they would have lost their annual crops, as well as their alfalfa and their trees.

CONCLUSION.

If the decree is a decree *in rem* in an action to quiet title it is void on its face.

If the decree is a judgment *in personam* the court had no power to appoint an officer, to-wit, Commissioner Firth, to invade the sovereignty of New Mexico, take physical possession of real property in that state and proceed to partition it. A judgment *in personam* could only operate to constrain the appellants to yield to the court's orders, and it is not binding on the

heirs or purchasers who are not parties to the original suit. The Sunset Ditch or Canal Company was at the time suit was filed, and is now, dissolved, and it is clearly shown by the evidence that the court cannot enforce its decree because the State of New Mexico is in possession of the Sunset Ditch.

It is not shown that the appellants violated any express order of the court, and it appears from the record that the fine imposed was punitive, not compensatory; not supported by evidence of actual damage or loss to appellees occasioned by the acts of the appellants complained of, or necessitated by the presentation of this matter to the court.

It is respectfully submitted that the judgment should be reversed with instructions to the lower court to set its judgment aside and either vacate the consent decree as to these appellants or dismiss the petition in the contempt proceeding.

Dated, Albuquerque, New Mexico,
October 16, 1940.

Respectfully submitted,
M. C. MECHEM,
A. T. HANNETT,
Attorneys for Appellants.

H. VEARLE PAYNE,
L. P. McHALFFEY,
Of Counsel.

(Appendix Follows.)

Appendix.

Appendix

LAWS OF NEW MEXICO—1912

CHAPTER 84

AN ACT TO PROVIDE FOR THE ORGANIZATION AND OPERATION OF DRAINAGE DISTRICTS, CONFERRING ADDITIONAL POWERS ON CERTAIN OFFICERS, AND FOR THE ISSUING OF BONDS, LEVYING ASSESSMENTS ON LANDS BENEFITED, EXTENDING THE RIGHT OF EMINENT DOMAIN, AND FOR THE CONSTRUCTION AND MAINTENANCE OF DITCHES AND OTHER WORKS.

Section 1. Whenever a majority of the adult owners of lands within any district of land, who shall represent one-third in area of the lands within said district to be reclaimed, or benefited, desire to construct one or more drains or ditches, or to acquire by purchase or otherwise, drains theretofore constructed, or outlets for drains, for the promotion of agricultural interests and the drainage of said lands, or desire to maintain and keep in repair any such drain or ditch theretofore constructed, such owners may file in the district court of any county in which the lands, or any part of them shall lie, a petition setting forth:

1. The proposed name of said drainage district.
2. The necessity of the proposed drainage work, describing the necessity.
3. A general description of the proposed starting points, routes, and termini of the proposed drains or ditches.

4. A general description of the lands proposed to be included in said district.

5. The names of the owners of all lands in said district when known.

6. If the purpose of said petitioners is the enlargement, repair and maintenance of a ditch or drain or other work theretofore constructed, said petition shall give a general description of the same, with such particulars as may be deemed important.

7. Said petition shall pray for the organization of a drainage district by the name and with the boundaries proposed, and for the appointment of commissioners for the execution of such proposed work, according to the provisions of this and the following sections.

United States
Circuit Court of Appeals
For the Ninth Circuit.

STATE BOARD OF EQUALIZATION OF THE
STATE OF CALIFORNIA,

Appellant,

vs.

L. BOTELER, Trustee in Bankruptcy of the Estate
of Davis Standard Bread Company, a corpora-
tion,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the
United States for the Southern District
of California, Central Division.

FILED

MAR - 5 1942

DAUL P. O'BRIEN,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

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Attorney General of the State of California,

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California,

903 State Building,

Los Angeles, California.

For Appellee:

WILLIAM E. WOODROOF, Esq.,

FRANK C. WELLER, Esq.,

THOMAS S. TOBIN, Esq.,

Board of Trade Building,

111 West Seventh Street,

Los Angeles, California. [1*]

In the District Court of the United States
Southern District of California

Central Division

Chapter X Proceeding
No. 36845-BH-Bkey.

In the Matter of

DAVIS STANDARD BREAD COMPANY,
a corporation,

Debtor.

DEBTOR'S PETITION UNDER CHAPTER X
OF THE NATIONAL BANKRUPTCY ACT

To the Honorable Judges of the District Court of
the United States for the Southern District of
California, Central Division:

The petition of Davis Standard Bread Company,
a California corporation, hereinafter referred to as
the "debtor", respectfully shows:

I.

That the debtor is a corporation, organized and
existing under and by virtue of the laws of the State
of California, and is a citizen and resident of the
State of California within the district and within
the division aforesaid. The debtor is not a railroad,
municipal, insurance, banking corporation, nor a
building and loan association; the debtor is not
engaged, principally or at all, in farming or in the

tillage of the soil, or in agricultural or horticultural pursuits. That during all of the six (6) months immediately preceding the filing of this petition, the debtor was and has been such a resident and citizen, and had, during all of said times, and now has, its principal place of business in the City of Los Angeles, County of Los Angeles, State of California, at which place it was and now is engaged in the business of maintaining and operating a bakery business, in connection with which the debtor operates two bakeries in the City of Los Angeles, where it bakes and produces bakery products and pastries of many kinds, and in connection therewith likewise maintains and operates some fifty-two (52) stores for the sale of its bakery products and other products which it purchases at wholesale and sells through said stores. That in connection with said bakery business the debtor likewise main- [2] tains and operates some two hundred (200) retail delivery routes serviced by trucks and drivers, for the sale of bakery and food products manufactured or purchased by the debtor to its retail customers located in many sections of Southern California. That the debtor, likewise, sells a large quantity of its bakery products to wholesale dealers, and for that purpose maintains certain wholesale routes serviced by employees and trucks of the debtor. The address of the debtor corporation is 120 North Beaudry, Los Angeles, California.

II.

The debtor, petitioner herein, has an authorized capital of One Hundred Thousand Dollars (\$100,000.00), divided into two thousand (2000) shares of common stock of a par value of Fifty Dollars (\$50.00) each. There have been issued sixteen hundred (1600) shares, and no more, of which all are now outstanding.

The names and addresses of the shareholders of the debtor are as follows:

name	shares
R. R. Beamish 120 No. Beaudry Los Angeles, California.....	350
W. M. Beamish 120 No. Beaudry Los Angeles, California.....	350
R. R. Beamish and W. M. Beamish as tenants-in-common 120 No. Beaudry Los Angeles, California.....	500
Ella Davis 139 Delaware Street Woodbury, New Jersey.....	120
Lida D. Kirkbride 226 Delaware Street Woodbury, New Jersey.....	120
Francis B. Davis 54 No. Woodland Ave., Woodbury, New Jersey.....	160

The debtor corporation was organized November 15, 1905 and at all times since the year 1905 has been engaged in the bakery business, and at all such times its capital stock has been closely [3]

held among relatives of John Warner Davis and the two Beamish Brothers above named. That said corporation at all of such times has been well and favorably known in the bakery business, and over said period of years has built up and maintained a reputation for the quality of its products, the stability of its business and the integrity of its officers in the management and operation of said business. That debtor's food products are sold under the tradename of "Perfection" and that said tradename of "Perfection" and Perfection Bakery Products is well and favorably known throughout all of Southern California and in particular throughout the whole of the County of Los Angeles.

III.

That the debtor has no outstanding bonded indebtedness; that no bonds have been issued or are outstanding; that there are no attachments or liens against the property of your petitioner, the debtor; that there are no outstanding judgments against the debtor; that your petitioner has no preferred claims for labor, other than current labor outstanding; that no receiver has been applied for in any court to take over the property or business of the debtor, and no receiver has been appointed.

That there are eight (8) suits or legal actions pending in which Davis Standard Bread Company, the debtor, is a party defendant. That each and every of the claims made and represented to be made by the plaintiffs, in said suits and actions, are

wholly or partially covered by insurance policies indemnifying the debtor from loss or damage resulting from judgments in said action, and in all but three of said actions the amount claimed in the same does not exceed the amount of coverage for which the debtor is protected by insurance. That said actions are entitled, and are brought for the purpose of recovering damages in the amounts, as follows:

Thomas A. Quirk, Plaintiff, against the debtor—damages for an automobile accident; amount claimed One Hundred Fifteen Thousand Two Hundred and Fifty Dollars (\$115,250.00). The debtor has been [4] advised by the attorneys representing the insurance company insuring the debtor against loss by this claim that the plaintiff in said action has not suffered damage in sufficient amount to warrant the recovery of a judgment against the debtor in any amount exceeding the amount of coverage by the debtor's insurer.

N. Tully, against the debtor—claim made for damages occasioned by one of the debtor's products, amount of damages claimed Sixteen Thousand Dollars (\$16,000.00). The debtor is advised by counsel for its insurer, that the amount which may be recovered on said claim will not exceed the coverage afforded the debtor by its products' insurance.

P. Mastin, Plaintiff, against the debtor—claiming damages from one of debtor's products, amount of claim Nineteen Hundred and twenty Dollars (\$1920.00). Covered by product insurance.

Mrs. Malin, Plaintiff, against the debtor, claiming damages from one of the debtor's products, amount claimed Fifty-two Hundred Dollars (\$5200.00)—covered by the debtor's products' insurance.

Rowins, Plaintiff, against the debtor, claiming damages from the use of the debtor's products—amount claimed Twenty-five Thousand Dollars (\$25,000.00); the debtor is advised that the actual damages cannot exceed the amount of the debtor's products' insurance coverage.

L & R Catalano, Plaintiff, against the debtor, claiming damages arising from the use of debtor's products—amount claimed Fifteen Hundred and Fifty Dollars (\$1550.00), covered by debtor's products' insurance.

Wells, Plaintiff, against the debtor, claiming damages occasioned by use of debtor's products—amount claimed Twenty Thousand Dollars (\$20,000.00); the debtor has been advised by counsel representing its insurers that the actual damage and recovery therefrom cannot exceed the amount of coverage afforded the debtor under its products' liability insurance.

Barnett, Plaintiff, against the debtor, claiming damages oc- [5] casioned by the use of debtor's products—amount claimed Twenty Thousand Dollars (\$20,000.00); the debtor has been advised by counsel representing its insurers, that the actual damage and the amount which may be recovered will not exceed the amount of its products' insurance coverage.

That said above-entitled actions in this paragraph mentioned, are pending in either the Superior Court of the State of California, in and for the County of Los Angeles, or in the Municipal Court of the City of Los Angeles, State of California, dependent upon the jurisdictional amount involved.

IV.

That debtor has no outstanding mortgages covering either real or personal property, and has no secured indebtedness outstanding.

V.

That the reasons for the debtor's present financial condition are as follows:

First, the retail stores operated by your petitioner have for many months last past been unable to operate at a profit due to the fact that overhead is more or less constant and that sales have gradually decreased to the point where there is not sufficient gross profit to absorb that overhead as well as that portion of the overhead of the bakery business as a whole, which is charged to the store operation. Several factors have contributed to the decrease in sales of the stores among which have been bread wars and the fact that bread, sold by stores in the markets where petitioner's stores are located, has in many instances been cut in price to the point where petitioner's stores could not meet that competition and price without selling bread and other food products at a loss. In addition to this

situation, a strike has been in progress for more than a year against petitioner, as a result of which petitioner's stores have been picketed, and sales have to a certain extent been affected thereby. General conditions in many districts during the past sev- [6] eral months have been such that sales of all products whether those handled by petitioner's stores, or handled in other stores in the markets where petitioner's stores are located, have been very much reduced in volume. All of these factors have to a certain extent affected the gross business done by petitioner's stores, with the result that the petitioner has been losing approximately Ten Thousand Dollars (\$10,000.00) per month.

Second, Due to lack of finances with which to consolidate its bakeries, petitioner for many years has been operating two bakeries, as hereinabove alleged. The operation of two bakeries has resulted in additional overhead and other charges being duplicated in each bakery, which when combined with the reduced margin of profit occasioned by price cutting competition has made it increasingly difficult for petitioner to operate its bakeries at a profit. The consolidation of the two baking plants would result in a very material saving in operating expenses and would work to the advantage of petitioner.

Third, the strike against petitioner's bakery has resulted in widespread picketing, and has to a certain extent contributed to a decreased sale of petitioner's products not only in its stores but also

on the routes and to the customers served by petitioner's drivers and trucks.

Fourth, lack of working capital has made it impossible for petitioner to effect economies in its operations necessary to lower its production and handling cost in order to meet bread wars and price-cutting campaigns which have been commenced and carried on from time to time in the bakery business. The reorganization plan which will be referred to later, contemplates obtaining additional capital and contemplates that certain economies in manufacturing, distribution and sales operation will be accomplished, which will permit petitioner once more to operate at a substantial profit.

The debtor has recently effected and is now affecting economies in its operations so that in the future, and when said economies [7] have been fully worked out, the business can be operated at a substantial profit. If petitioner's stores can be disposed of, and petitioner can be relieved of all liability for the operation thereof, it will be enabled to commence showing a substantial profit immediately, and in this behalf petitioner states that its gross sales have for many years last past exceeded Two Million Dollars per year, and that at the present time and during the summer months, when petitioner's business has reached the lowest ebb in its history, petitioner's sales are still being made at the rate of One Million Seven Hundred and Fifty Thousand Dollars per year, or from Thirty-two to Thirty-five Thousand Dollars per week.

VI.

That the plant and business of your petitioner can be operated at a profit commencing not later than thirty (30) days after the filing of this petition, and can continue to operate at a profit.

VII.

Petitioner alleges that it is unable to pay its debts as they mature; that no bankruptcy proceeding, no debtor proceeding and no proceeding for the appointment of a receiver or a trustee is pending at this time in this or any other court. That a condensed statement of assets and liabilities as of the last available trial balance, to wit: June 30, 1940, is attached hereto marked Exhibit "1", and by reference is incorporated herein as a part of this petition as fully as if set forth at length herein.

VIII.

That among the assets of the debtor are unencumbered real estate, buildings, equipment, raw materials, finished products currently on hand from day to day, accounts receivable, and cash. Petitioner's financial condition as of the date of the filing of this petition is not substantially worse or different from its financial condition as shown by said exhibit numbered "1", with the exception that its cash has been somewhat reduced and its [8] accounts payable have increased; as, for example, of the close of June, 1940, petitioner had no unpaid or delinquent rent on the stores operated

by it, whereas as of the close of business July 31, 1940, petitioner's unpaid rental obligations to its lessors amount to Three Thousand Fifty-four and 56/100 Dollars (\$3,054.56), more or less. This condition has been brought about first by a continuing loss in operations, and second, by reason of the fact that many of petitioner's creditors holding accounts receivable have insisted upon substantial payments of their accounts under the threat of refusing to deliver further materials to petitioner unless said payments were made.

Petitioner is under obligation to The White Motor Company, on a contract for the purchase of trucks, to pay a sum slightly in excess of Two Thousand Dollars (\$2000.00) per week. Petitioner has no present existing delinquency on said contract.

IX.

Your petitioner alleges that relief cannot be obtained under Chapter XI of the National Bankruptcy Act and amendments thereto, and herein shows the facts why such adequate relief cannot be obtained, and herein shows the specific facts constituting the necessity and need for relief under the provisions of Chapter X of said Act.

First: Your petitioner alleges that it does not have at the present time, cash, nor can it raise the cash, to continue the operation of the business and the rehabilitation of the business of the debtor and to continue purchasing raw materials for furnishing food and bakery products to its customers; that

it can raise no funds for the payment of a cash dividend at this time to its creditors by which it could qualify under Chapter XI.

Second: That unless the debtor's business is continued without interruption, it will suffer immediate and irreparable loss which could never be remedied because of the fact that it is required to serve its customers and service its routes and operate its stores daily. [9]

Third: That your petitioner does not desire to scale down its debts to its general creditors, but desires only an opportunity to reorganize its business, to eliminate certain losing departments of said business to effect certain operating economies, to sell real estate, and to obtain additional and new working capital, all as a part and as a preliminary operation to a complete reorganization, for the purpose of paying or providing for the payment of all of its outstanding obligations to its unsecured creditors, and by obtaining an extension of time within which to pay its debts in full without diminution in amount.

X.

Your petitioner is unable to pay its debts as they mature, and desires to effect a reorganization or extension for the purpose of refinancing in order to pay off, refund, or otherwise liquidate all of its debts in full, to retain as much of its assets, including tangibles and intangibles, as may be necessary to the continued successful operation of the business as well as to retain the goodwill of its

customers. That the debtor has elected to, and does elect to take the benefits, for itself and for its creditors, of the provisions of Chapter X of the Acts of Congress relating to bankruptcy.

XI.

That due to the fact that it requires some Fifty Thousand Dollars (\$50,000.00) per month for materials purchased by petitioner with which to operate its business, and by reason of the fact that petitioner's cash is depleted to a point where it has less than Two Thousand Dollars (\$2000.00) as of the date of the filing of this petition, your petitioner represents and alleges that it is necessary that this Honorable Court immediately upon the appointment of a receiver or receivers or a trustee or trustees, authorize such receivers or trustees to continue the operation of said business, and to issue certificates of indebtedness for cash, property, or other consideration to be approved by the Court, upon such terms [10] and conditions, and with such security and priority in payment over existing obligations, secured or unsecured, as may be necessary from time to time in the continued operation of said business, and as in the particular case may be equitable. And, in this behalf, your petitioner further alleges and represents that petitioner has on hand materials sufficient only to continue in the manufacture and production of its bakery products for a period of two or three days, and that unless immediate relief is afforded petitioner, and unless

the receiver, receivers, or trustees appointed or to be appointed by the court in this matter, are authorized to borrow money and/or to obtain credit and to issue certificates of indebtedness, for the purchase of raw materials, petitioner's business will suffer irreparable injury and any reorganization plan which might be submitted will become impossible to consummate. Petitioner states that the drivers of its retail routes work on a percentage basis and are entirely dependent for their livelihood upon such bakery and food products as are supplied to them, and to their trucks daily by petitioner. Any interruption of petitioner's business which results in failure on the part of petitioner to supply said trucks and said drivers with food and bakery products will result in the unemployment of said drivers and of severe financial hardship to them and to the families dependent upon them for support.

XII.

Petitioner further states that negotiations are in progress for the reorganization of petitioner's business, but said negotiations cannot be completed and said plan cannot be submitted to the Court until petitioner's business has first been reorganized and the business placed upon a basis where it can show earnings from month to month, and until certain operations, namely the operation of its stores, has been eliminated and until one parcel of its real estate has been sold and its two baking plants have

been consolidated and enabled to operate under one roof. [11]

XIII.

Your petitioner states that its indebtedness exceeds Two Hundred Fifty Thousand Dollars (\$250,000.00). Your petitioner believes, and, basing its allegation upon such belief, therefore alleges that petitioner's best interests will be served by, and that the many complications of its business require, the appointment of two trustees—one trustee who shall be a disinterested person, and an additional trustee who is an official and director of the corporation and is familiar with the details of petitioner's business. Your petitioner further states and alleges that it desires to and does hereby request that this Honorable court appoint S. H. Smith as the first trustee and as the trustee required by law to be a disinterested person, and that the court appoint as an additional trustee, R. R. Beamish, who is now and for many years last past has been president and a director of petitioner; and in this behalf petitioner represents and alleges that S. H. Smith is a disinterested person and is qualified for many reasons to act as principal trustee of the affairs of petitioner in the above-entitled matter. Petitioner further alleges that for many weeks last past S. H. Smith has been studying the business methods and problems of petitioner, and is now thoroughly familiar with the details of the business and in particular is familiar with and has worked out definite plans for the solution of its financial problems. S. H.

Smith has had many years experience in reorganizing and assisting in reorganizing and refinancing many corporations engaged in many different lines of business. He is a resident of the City of Los Angeles, County of Los Angeles, State of California. He is not a creditor or stockholder of the debtor. He is not now and never has been an underwriter of any of the outstanding securities of the debtor and has not within five years prior to the date of the filing of the within petition been an underwriter of any securities of the debtor; he is not now and has not, at any time within two years prior to the date of the filing of said petition, been a director [12] or officer or employee of the debtor or of any such underwriter; the said S. H. Smith has not any other direct or indirect relationship to, connection with, or interest in the debtor or any such underwriter, and has not for any reason any interest materially adverse to the interests of any class of creditors or stockholders; S. H. Smith is not an interested person as defined by Section 588 of Chapter X of the National Bankruptcy Act.

R. R. Beamish is personally acquainted with all of the creditors of petitioner, and has been actively engaged in managing all of the business affairs of petitioner for many years last past. Petitioner feels that the creditors and the employees of petitioner will feel more secure, and will be more willing to cooperate in the many problems facing the reorganization of petitioner, if R. R. Beamish is appointed as the additional or second trustee to assist

in the management of the affairs of petitioner under the orders and supervision of this Honorable Court.

That a copy of a resolution adopted by the Board of Directors of Davis Standard Bread Company, authorizing the filing of the within petition, duly certified by its Secretary, is attached hereto and marked Exhibit "2" and by reference incorporated as a part of this petition as fully as if set forth herein at length.

Wherefore, your petitioner prays that this Honorable Court makes its order approving this petition as properly filed in good faith under Chapter X of the Acts of Congress relating to Bankruptcy; that the Court find and order that there is no necessity for the appointment of a receiver; that the Court make its order appointing S. H. Smith as one trustee, as a disinterested person, and make its order appointing R. R. Beamish as president, and as a director of petitioner, as an additional trustee, both of said trustees to be appointed with authority to operate said business until further order of this Court; that the Court authorize the trustees, upon such notice as the Court may prescribe, or upon Order to Show Cause, to issue certificates of indebtedness for cash, [13] property, or other consideration from time to time, to be approved by the Court, upon such terms and conditions, and with such security and priority in payment over existing obligations secured or unsecured, as in this particular case may be equitable; that the Court shorten the

time of the notice fixing the date for hearing on any order which it may desire to make authorizing the trustees to issue said certificates of indebtedness for cash, property, or other consideration; that the Court authorize the trustees, upon such notice as the Court may from time to time prescribe and upon cause shown, to lease and/or to sell any property of the debtor whether real or personal, upon such terms and conditions as the Court may approve; that the Court enjoin or stay, until final decree, the commencement or continuation of a suit against the debtor or its trustees or any act or proceeding to enforce a lien upon the property of the debtor; and for all such other and further relief as to the Court may seem proper and meet in the premises.

(Seal)

DAVIS STANDARD BREAD
COMPANY, a corporation
By CHARLES BEAMISH
Secretary
Petitioner

YOUNG & KELLY

By E. L. SEARLE

YOUNG AND KELLEY

634 South Spring St.

Los Angeles, California

TRinity 2661

Attorneys for Petitioner

United States of America,
Southern District of the State of California,
County of Los Angeles—ss.

Charles Beamish, being first duly sworn, deposes and says:

That he is the Secretary of Davis Standard Bread Company, a corporation, and has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to such matters he believes it to be true.

That as Secretary of petitioner corporation, he is authorized to make and verify this petition by the corporation for which he purports to act, a certified copy of the resolution authorizing said [14] action being attached to this petition and referred to by affiant.

(Seal) CHARLES BEAMISH

Subscribed and sworn to before me this 5th day of August, 1940.

(Seal) E. L. SEARLE

Notary Public in and for the County of Los Angeles,
State of California.

[15]

United States of America,
Southern District of the State of California,
County of Los Angeles—ss.

Charles Beamish, being first duly sworn, deposes and says:

That he is the Secretary of Davis Standard Bread Company, a corporation, and has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to such matters he believes it to be true.

That as Secretary of petitioner corporation, he is authorized to make and verify this petition by the corporation for which he purports to act, a certified copy of the resolution authorizing said [14] action being attached to this petition and referred to by affiant.

(Seal) CHARLES BEAMISH

Subscribed and sworn to before me this 5th day of August, 1940.

(Seal) E. L. SEARLE

Notary Public in and for the County of Los Angeles,
State of California.

[15]

EXHIBIT 1

BALANCE SHEET

Davis Standard Bread Company

June 30, 1940

ASSETS

Current Assets

Cash:

Demand deposits	\$ 4,315.28	
For deposit	12,989.81	
Office and branch cash funds	719.18	\$ 18,024.27

Accounts receivable:

Federal Surplus Commodities Corporation food stamps	\$ 419.00	
Customers' accounts	\$8,914.52	
Less reserve	2,033.57	6,880.95
Salesmen's due bills (secured by cash deposit)	1,154.31	8,454.26

Inventories—at lower of cost or market:

Ingredients	\$ 22,208.38	
Wrapping materials	34,490.23	
Specialty purchases	4,977.53	61,676.14

\$ 88,154.67

Other Assets

Accounts receivable from employees:

For purchase of uniforms, cash advances, etc.	3,921.43	\$ 16,046.22
--	----------	--------------

Accounts receivable from officers:

State compensation insurance fund— expected dividend, 1939 policy	387.20	
Sundry accounts receivable	5,358.55	21,950.26
	158.29	

Property, Plant and Equipment

Land	\$148,696.85	
Buildings, machinery and equipment	155,187.43	\$303,884.28

Automotive equipment purchased from The White Motor

Company on conditional sales contract	\$379,477.73	
Less reserve for depreciation	21,082.10	662,279.91

Deferred Charges

Interest on conditional sales contract	\$ 44,478.68	
Insurance	15,816.12	
Licenses and taxes	4,357.56	
Prepaid rentals	1,190.00	
Supplies inventories	9,529.02	75,371.38

\$847,756.22

[16]

LIABILITIES, CAPITAL STOCK AND SURPLUS

Current Liabilities:

Notes payable	
For money borrowed	\$ 26,000.00
For purchases of equipment (other than automotive equipment)	13,020.37
	\$ 39,020.37

Conditional sales contract:

Due The White Motor Company prior to June 30, 1941	\$ 103,034.20
Bank checks outstanding	
Less cash on deposit	9,713.46

Accounts payable:

Trade accounts	\$189,872.79
Salaries, wages and commissions	18,145.61
Pay roll taxes	17,505.65
Employees' deposits	6,427.50
Due company salesmen	2,698.98
Estate of J. W. Davis	724.20
	235,374.73

Accrued:

Federal capital stock tax	440.00
	\$391,582.76

Conditional Sales Contract

Due The White Motor Company	\$407,553.30
Less amount due prior to June 30, 1941 as shown above	107,034.20
	300,519.10

Reserve

For taxes	3,455.01
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Due Officers

R. R. Beamish	\$ 3,248.01
W. M. Beamish	10,540.71
Charles Beamish	4,500.00
	18,288.72

Capital Stock and Surplus

Capital stock:

Par value \$50.00 per share—authorized 2000 shares; issued and outstanding 1600 shares	\$ 80,000.00
Earned surplus	53,910.63

Contingent Liabilities

As endorser on employees' loans from bank
aggregating \$4,590.92.

\$847,756.22

[17]

EXHIBIT 2
RESOLUTION

Be it resolved, that Davis Standard Bread Company, a corporation, for the benefit of its creditors and its stockholders, file forthwith a petition in the United States District Court, for the Southern District of California, Central Division, asking for relief under Chapter X of the Chandler Act of 1938, and praying said Court for permission to rehabilitate itself, either by reorganization or an extension plan later to be formulated;

Be it further resolved, that the vice-president or the Secretary of this corporation be and is hereby authorized to execute said petition, and other papers necessary for the institution and maintenance of said proceeding, in the name of this corporation.

I, Charles Beamish, Secretary of Davis Standard Bread Company, a corporation, hereby certify that at a meeting of the Board of Directors of said corporation held on the 5th day of August, 1940, at which there were present a quorum necessary to do business, the foregoing resolution was passed, adopted and spread upon the minutes of the corporation, and that the same has not, as of this date, been revoked.

(Seal)

CHARLES BEAMISH

Secretary of Davis Standard Bread
Company, a corporation [18]

[Endorsed]: Filed Aug. 5, 1940, 1:25 P.M. R. S. Zimmerman, Clerk. By L. B. Figg, Deputy Clerk.

[Title of District Court and Cause.]

ORDER ADJUDGING DEBTOR BANKRUPT,
DIRECTING THAT BANKRUPTCY BE
PROCEEDED WITH, REFERRING SAID
CAUSE TO A REFEREE, APPOINTING A
RECEIVER AND FIXING TIME AND
PLACE OF HEARING ON TRUSTEES'
ACCOUNTS AND REPORTS AND APPLI-
CATIONS FOR FEES

The above entitled matter having come on for hearing before the undersigned Judge of the above named Court on July 30th, 1941 after several continuances, and the Trustees appearing in person and by their Attorneys, Messrs. William E. Woodroof and Frank C. Weller (Thomas S. Tobin of counsel), and the debtor appearing by its Attorney, Edwin L. Searle, and the Creditors' Committee appearing by Rex Hardy, Lawrence Kelley, and H. P. Hibbard, and testimony having been taken and it appearing to the Court that all attempts at the operation of the business of the debtor have been unsuccessful, that substantial losses have been sustained in said operations, and that said losses will continue in the event of further operation, and it further appearing to the Court that the Plan of Reorganization proposed by the debtor cannot be successfully consummated and that no other Plan of Reorganization can be proposed, and that for the protection of creditors and other parties in interest it is necessary that an Order of Adjudication in Bankruptcy be entered and that bankruptcy be

proceeded with, and that a Trustee be elected or appointed pursuant to Section 44 of the Bankruptcy Act to supersede the Trustees herein appointed, and [19] it further appearing to the Court that for the protection of creditors and parties in interest the operation of the business should continue until such time as a Trustee can be elected or appointed under Section 44 of the Bankruptcy Act, and that for the purpose of such operation and the protection of the bankrupt estate a Receiver in Bankruptcy should be promptly appointed to continue the operation of said business pending the election of a Trustee, and the Court being fully advised in the premises, and there appearing to be no objections thereto;

Now, on motion of Messrs. Frank C. Weller and William E. Woodroof, Attorneys for the Trustees, (Thomas S. Tobin of counsel);

It is ordered that the Davis Standard Bread Company, a corporation, be, and it hereby is, adjudged a bankrupt under the provisions of Section 4, Subdivision A of the Bankruptcy Act of the United States of 1938, and

It is further ordered that the bankruptcy of said debtor be proceeded with pursuant to the provisions of said Act.

It is further ordered that all proceedings in bankruptcy be referred to Benno M. Brink, one of the Referees in Bankruptcy for this District, generally, save and except that the Judge of this Court retains jurisdiction to examine and settle the accounts of L. Boteler and S. H. Smith, Trustees

appointed in the reorganization proceedings herein, and the determination and allowance of fees of such Trustees and their counsel.

It is further ordered that L. Boteler of Los Angeles, California be, and he hereby is, appointed Receiver in Bankruptcy of all property of whatsoever nature and wheresoever located, now owned by or in the possession of said debtor, or of the Trustees appointed in the proceeding in reorganization herein, with the authority to take possession of, hold, preserve, care for, inventory, insure, segregate and remove all assets of the debtor until the appointment and qualification of a Trustee herein, and with the [20] further authority to collect such accounts receivable as are due to said estate; and with further authority to conduct the business and sell the same as a going concern if it can be done with benefit to said estate; and said Receiver is authorized to do all and any such acts, and to take all and any such proceedings as may enable him to forthwith obtain possession of all and any such property, and

It is further ordered that said Receiver be, and he hereby is, specifically authorized, should necessity appear, to sell any of the assets of the bankrupt estate during said Receivership subject to the Order of the Referee authorizing such sale, or sales.

It is further ordered that the duties and compensation of said Receiver are hereby specifically extended beyond those of a mere custodian within the meaning of Section 48 of the Bankruptcy Act, to

embrace the conduct of the business and the marshalling of assets, preparation of inventories, collection, sale and disposition of accounts and notes receivable, and conduct the business of said debtor as hereinbefore specifically authorized; and

It is further ordered that all persons, firms, and corporations, including said bankrupt, and all attorneys, agents, officers, and servants of said bankrupt, herewith deliver to said Receiver all property of whatsoever nature and wheresoever located, including merchandise, accounts, notes and bills receivable, drafts, checks, moneys, securities, and all other choses in action, account books, records, chattels, lands and buildings, life and fire, and all other insurance policies in the possession of them, or any of them, and owned by said bankrupt, and said bankrupt is ordered to forthwith deliver to said Receiver all and any such property now in the possession of said bankrupt; and

It is further ordered that all persons, firms, and corporations, including all creditors of said bankrupt and representatives, agents, attorneys, and servants of all such creditors, and all [21] sheriffs, marshals, and other officers and their deputies, representatives and servants, are hereby enjoined and restrained from removing, transferring, disposing of, or selling, or attempting to in any way remove, transfer, or dispose of, sell, or in any way interfere with any property, assets, or effects in the possession of said bankrupt, or owned by said bankrupt, whether in possession

of any officers, agents, attorneys, or representatives of said bankrupt, or otherwise, and all of said persons are further enjoined from executing or issuing, or causing the execution or issuance or suing out of any Court, any writ, process, summons, attachment, replevin, or any other proceeding for the purpose of impounding or taking possession of or interference with any property owned by or in the possession of said bankrupt, or owned by said bankrupt whether in possession of any agents, servants, or attorneys for said bankrupt, or otherwise, and

It is further ordered that said Receiver is authorized and directed, as provided under the Postal Laws and Regulations of the United States, to receive all mail matter addressed to the above named bankrupt, and

It is further ordered that before entering upon his duties the Receiver shall furnish a bond, conditioned for the faithful performance of his duties, with a good and sufficient surety, or sureties, in the sum of \$50,000.00.

It is further ordered that L. Boteler and S. H. Smith, Trustees under the reorganization proceedings herein, shall close their books of account as of midnight of the day that the Receiver herein shall qualify, and shall thereupon deliver the assets of said business to the said Receiver, and shall thereupon prepare and file herein their final account and report.

It is further ordered that Frank C. Weller and

William E. Woodroof, Attorneys for the Trustees in the reorganization proceedings herein, shall prepare and file herein their final petition for [22] fees herein.

It is further ordered that a hearing will be had before the above entitled Court on September 15, 1941 in Court Room No. 6 Federal Building, Temple and Spring Streets, Los Angeles, California, before Honorable Ben Harrison, at 10 o'clock A. M., or as soon thereafter as the matter may be heard, to consider the current account and report and the final account and report of S. H. Smith and L. Boteler, Trustees in the reorganization proceedings herein, and the applications for fees, if any, on behalf of counsel, and

It is further ordered that the Referee in preparing the Notice for the first meeting of creditors to be held before him, shall include in said Notice the time, place and purpose of the hearing before the undersigned District Judge in said connection, and shall send said Notices to the persons designated under the provisions of Chapter X.

Done at Los Angeles, in the Southern District of California, this 30th day of July, 1941.

BEN HARRISON

Judge of the United States
District Court

[Endorsed]: Filed 3:26 P.M., July 30, 1941. R. S. Zimmerman, Clerk. By M. M. Karcher, Deputy Clerk. [23]

[Title of District Court and Cause.]

ORDER APPROVING APPOINTMENT
OF TRUSTEE

At Los Angeles, in said district, on the 14th day of August, 1941.

L. Boteler of Los Angeles, having been appointed trustee of the estate of the above named bankrupt by the creditors of said bankrupt, as provided in the Act of Congress relating to bankruptcy,

It is ordered that the appointment of said L. Boteler as trustee be, and it hereby is, approved, and the amount of his bond is fixed at Fifty thousand dollars, provided, that if at any time the value of the property of the said estate, in the possession of or under the control of the said Trustee, shall exceed the amount of the said bond, the said Trustee shall forthwith file a petition herein setting forth the facts and praying for an order directing him to file an additional bond in such amount as may be proper.

It is further ordered that all claims filed at or before the first meeting of creditors in this matter be and they are hereby allowed, unless otherwise noted on said claims.

ERNEST R. UTLEY

Referee in Bankruptcy

United States of America,
Southern District of California,
Central Division—ss.

I do hereby certify that the within instrument is a true and correct copy of the original thereof as the same appears of record in my office.

In witness whereof, I hereunto set my hand this 27th day of January, 1942.

BENNO M. BRINK

Referee in Bankruptcy

S

[Endorsed]: Filed Jan. 29, 1942. R. S. Zimmerman, Clerk. [24]

[Title of District Court and Cause.]

TRUSTEE'S PETITION FOR
RESTRAINING ORDER

Honorable Benno M. Brink, Referee in Bankruptcy:

Comes now your petitioner, L. Boteler, and respectfully shows the Referee:

I.

That he is the duly elected, qualified and acting trustee in bankruptcy herein.

II.

That your petitioner, as trustee and receiver, made several unsuccessful efforts to dispose of the assets of this bankrupt corporation by asking for bids on same from various parties whom your peti-

tioner believed would be interested in purchasing the plant of the bankrupt as a going concern; that your petitioner was unable to obtain satisfactory bids for said plant as a going concern, and has now been obliged, in the fulfillment of his duties as prescribed by Section 47-a, Subdv. (1) of the National Bankruptcy Act, to reduce the property of the bankrupt estate to money by means of a piecemeal sale which will involve the junking of the plant and the sale of the property in piecemeal to various and sundry persons. [25]

III.

That the sales which your petitioner proposes to carry out are sales of a purely liquidating nature. That your petitioner is informed that it is the intention of the State Board of Equalization of the State of California to require your petitioner to obtain a Retail Sales Tax Permit for the conduct of said sales and to collect a State retail sales tax from the purchasers on all the property sold by your petitioner under the mandatory provisions of the National Bankruptcy Act, or to hold your petitioner liable therefor.

IV.

That the collection of sales tax in a purely liquidating sale under the Bankruptcy Act of the United States from the purchasers thereof would result in the impeding of the liquidation of this estate by compelling the purchasers to pay three per cent

(3%) more than the purchase price offered for the assets. That your petitioner fears that if he does not comply with the demands of the State Board of Equalization of the State of California and does not take out a California Retail Sales Tax Permit, and does not collect said State retail sales tax, that it may result in his being surcharged on his bond for failure so to do.

That your petitioner does not believe that the State of California has a right to collect a State sales tax on property being liquidated in the United States District Court in bankruptcy where the business is not being conducted at retail, and believes that the State Board of Equalization of the State of California should be restrained from attempting to collect such sales tax. [26]

Wherefore, your petitioner prays that an Order issue requiring the State Board of Equalization of the State of California to show cause, if any there be, why a restraining order should not be made and entered restraining said Board from attempting to compel your petitioner, as trustee in bankruptcy, to take out a Sales Tax Permit and collecting a three per cent (3%) State retail sales tax for the State of California from purchasers of assets of this bankrupt estate in the liquidating thereof, and requiring said Board to establish before this Court its right, if any there be, to require the purchase of such Permit or to collect such tax, and that the trus-

tee be given such other and further relief as the court may deem just and equitable in the premises.

L. BOTELER

Trustee in Bankruptcy

WILLIAM E. WOODROOF &

FRANK C. WELLER

By FRANK C. WELLER

Attorneys for Trustee

United States of America,
Southern District of California,
Central Division,
County of Los Angeles—ss.

L. Boteler, being by me first duly sworn, deposes and says: that he is the Trustee and Petitioner in the above entitled action; that he has heard read the foregoing Petition of Trustee for Restraining Order and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

L. BOTELER

Subscribed and sworn to before me this 27th day of August, 1941.

(Seal) R. M. McLEOD

Notary Public in and for the County of Los Angeles,
State of California.

[Endorsed]: Filed Aug. 28, 1941. Benno M. Brink, Referee. Filed Oct. 9, 1941. R. S. Zimmerman, Clerk. [27]

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

Upon reading and filing the verified petition of L. Boteler, Trustee in Bankruptcy herein, and good cause therefor appearing,

Now on motion of William E. Woodroof and Frank C. Weller, Attorneys for the trustee, it is

Ordered that the State Board of Equalization of the State of California show cause before the undersigned Referee in Bankruptcy at his Court Room in the United States Post Office and Court House, Los Angeles, California, on the 10th day of September, 1941, at the hour of 2 o'clock, p.m., on said date, or as soon thereafter as counsel can be heard, why said State Board of Equalization of the State of California should not be restrained from attempting to compel the trustee in bankruptcy herein to take out a Sales Tax Permit and collecting a three per cent (93%) State retail sales tax for the State of California from purchasers of the assets of this bankrupt estate, and why said State Board of Equalization of the State of California should not establish before this court its right to require the purchase of such Permit or to collect such tax, and further, why the trustee should not be given such other and further relief as the court may deem just and equitable in the premises. [28]

Done at Los Angeles, in the Southern District of California, this 28 day of August, 1941.

BENNO M. BRINK

Referee in Bankruptcy

[Endorsed]: Filed Oct. 9, 1941. R. S. Zimmerman, Clerk. [29]

[Title of District Court and Cause.]

RESTRAINING ORDER AGAINST THE
STATE BOARD OF EQUALIZATION

The petition of the trustee for a restraining order coming on for hearing before the undersigned Referee in Bankruptcy at his Court Room in the United States Post Office and Court House on the 15th day of September, 1941, at the hour of 2 o'clock, P.M., on said date, the trustee appearing by his Attorneys Messrs. Frank C. Weller and William E. Woodroof (Thomas S. Tobin of counsel), and the State Board of Equalization appearing by Earl Warren, Attorney General of California, Alberta Belford, Deputy, and a Stipulation as to the facts having been entered into, and the Referee being fully advised in the premises,

Finds that the Trustee, L. Boteler, beginning with the second day of his tenure of office as trustee, has been liquidating the assets of the bankrupt; that he has collected, paid, or assumed responsibility for sales tax on all items of merchandise sold by him at retail; that he is now selling and disposing of

equipment and assets belonging to the bankrupt estate to purchasers at private sale for the purpose of liquidation, and is not operating the business of the bankrupt and is not selling such material and equipment as remains in his possession, at retail, but is converting the same into [30] cash under the provisions of Section 47 of the Bankruptcy Act, and is not required to procure a license from the State Board of Equalization to do so, nor to collect, nor to be responsible for sales tax on such sales, and that said sales are being made pursuant to the provisions of the Bankruptcy Act of the United States and to the orders of this Court, and that the State Board of Equalization of the State of California seeks to collect sales tax from said trustee,

Now on motion of Messrs. Frank C. Weller and William E. Woodroof, Attorneys for the trustee (Thomas S. Tobin of counsel), it is

Ordered that the prayer of the trustee's petition be, and it hereby is granted, and the State Board of Equalization of the State of California is hereby restrained and enjoined from attempting to compel the trustee in bankruptcy herein, L. Boteler, to take out a sales tax permit or to collect a three per cent State retail sales tax for the State of California from purchasers of the assets of this bankrupt estate in sales made by the trustee in the liquidation of this bankrupt estate and not made in the operation of the bankrupt's former business.

It is further ordered that the trustee be not

required to collect or pay sales tax on any items of the bankrupt estate sold to purchasers in connection with the liquidation thereof, except such sales as have been made in the usual course of retail business and in the actual operation thereof.

Done at Los Angeles, in the Southern District of California this 19th day of September, 1941.

BENNO M. BRINK

Referee in Bankruptcy.

Approved as to form under Rule 8.

EARL WARREN,

Attorney Gen.

By ALBERTA BELFORD,

Attorneys for State Board of
Equalization

[Endorsed]: Filed Oct. 9, 1941. R. S. Zimmerman, Clerk. [31]

[Title of District Court and Cause.]

PETITION FOR REVIEW

To the Honorable Benno M. Brink, Referee in
Bankruptcy:

The petitioner, State Board of Equalization, respectfully shows:

I.

That the Honorable J. J. Campbell is the duly qualified and acting Administrator of District No. 1, Sales Tax Division, State Board of Equalization, and as such Administrator he makes and files this

Petition for Review for and on behalf of said State Board of Equalization.

II.

That said State Board of Equalization has heretofore filed in this action its claim for sales taxes due the State of California; that thereafter L. Boteler as Trustee in Bankruptcy procured from the Bankruptcy Court an order to show cause directed to the State Board of Equalization of the State of California ordering them to appear and show cause, if any they have, why they should not be enjoined from attempting to enforce the provisions of the California Sales Tax Act against said Trustee in Bankruptcy; that a copy of said order to show cause is attached to and made a part hereof as though specifically set forth herein and marked Exhibit "A"; that [32] at the said time and place designated in said order to show cause the said State Board of Equalization appeared and responded to said order.

III.

That upon said hearing the Referee in Bankruptcy issued against the State Board of Equalization its permanent injunction enjoining the State Board of Equalization from enforcing or attempting to enforce the provisions of the California Retail Sales Tax Act against the Trustee in Bankruptcy of Davis Standard Bread Company, a corporation, Bankrupt; that a copy of said permanent injunction is attached to and made a part hereof as though specifically set forth herein and marked Exhibit "B".

ASSIGNMENTS OF ERROR

The court erred in issuing the said permanent injunction for the following reasons:

1. That said Trustee in Bankruptcy, L. Boteler, was selling on behalf of the bankrupt, Davis Standard Bread Company, a corporation, machinery and equipment at retail within the contemplation of the California Retail Sales Tax Act.

2. That an injunction against the State Board of Equalization will not lie for the reason that the said Trustee in Bankruptcy has under the California Retail Sales Tax Act an adequate remedy at law by paying the tax and suing to recover.

Wherefore, your petitioner prays that said order of the Referee in Bankruptcy be reviewed and reversed, and that said Referee be instructed to modify his order allowing permanent injunction and to review said permanent injunction and [33] to overrule any objection to said claim of the State Board of Equalization and to allow said claim in full, and for such other and further relief as to the court may seem meet and proper.

Dated this 18 day of September, 1941.

J. J. CAMPBELL

Petitioner.

EARL WARREN,

Attorney General of the State
of California,

By ALBERTA BELFORD

Deputy Attorney General,
Attorneys for Petitioner.

State of California,
County of Los Angeles—ss.

J. J. Campbell, being by me first duly sworn, deposes and says:

That he is District Tax Administrator of the State Board of Equalization of the State of California, District No. 1; that he has read the foregoing Petition for Review and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief and as to those matters he believes it to be true.

J. J. CAMPBELL

Subscribed and sworn to before me this 18 day of September, 1941.

(Seal) BETH RICE

Notary Public in and for said County and State.

My Commission Expires June 21, 1942.

Exhibit "A"—see Order to Show Cause, page 35.

Exhibit "B"—see Restraining Order, page 36.

[Endorsed]: Filed Sep. 23, 1941, Benno M. Brink, Referee. Filed Oct. 9, 1941, R. S. Zimmerman, Clerk. [35]

[Title of District Court and Cause.]

REFEREE'S CERTIFICATE ON PETITION
FOR REVIEW BY STATE BOARD OF
EQUALIZATION.

To the Honorable Benjamin Harrison, Judge of the
Above Entitled Court:

I, Benno M. Brink, one of the Referees in Bankruptcy of this Court, before whom the above entitled matter is pending, do certify to the following:

The State Board of Equalization of the State of California has filed its petition for review from an order made by your referee in this matter on September 19, 1941, in which he restrained and enjoined the said Board from attempting to compel the trustee herein, L. Boteler, to take out a sales tax permit or to collect a retail sales tax for the State of California from purchasers of the assets of this bankrupt estate, on sales made by the said trustee in the liquidation of this estate and not in the operation of the bankrupt's former business. Said order further decreed that the said trustee is not required to collect or pay sales tax on any items of this estate sold to purchasers in connection with the liquidation thereof, as distinguished from sales which were made by this estate in the actual operation of the bankrupt's business.

The Proceedings

On August 28, 1941, the trustee filed his petition [36] herein for an order to show cause (1) requir-

ing the State Board of Equalization of the State of California to show cause why an order should not be made restraining said Board from attempting to compel the said trustee to take out a sales tax permit or to collect a retail sales tax for the State of California from purchasers of assets of this estate in the liquidation thereof, and (2) requiring said Board to establish before this Court its right to require the said trustee to take out such permit or to collect such taxes.

An order to show cause was duly issued on said petition on August 28, 1941, and the same, after being once continued, came on for hearing before your referee on September 15, 1941, at 2:00 P. M., the trustee appearing by his counsel, William E. Woodruff and Frank C. Weller (Thomas S. Tobin appearing of counsel), and the State Board of Equalization appearing by its counsel, Hon. Earl Warren, Attorney General of the State of California, (Alberta Belford, Deputy Attorney General, appearing of counsel). The case was duly presented and thereafter, on September 19, 1941, your referee made the order which is here complained of.

The Questions Presented

The petition for review in this case presents these two questions:

1. Is the trustee in this matter subject to the provisions of the California Retail Sales Tax Act, so far as the liquidation of the assets of this estate is concerned?

2. Does the trustee in this case have an adequate remedy at law, in the situation here presented, by paying the tax here in question and then [37] suing to recover the same, and, if so, does this Court, nevertheless, have authority to enjoin the State Board of Equalization from attempting to compel the said trustee to take out a sales tax permit or to collect the sales tax here involved?

The Evidence

The undisputed facts are that this proceeding began under Chapter X of the Bankruptcy Act; that for a time the business of the bankrupt was operated by Chapter X trustees, of whom L. Boteler, the present trustee, was one; that thereafter an order of adjudication was entered and that thereupon Mr. Boteler was appointed as receiver in bankruptcy; that for a brief period he operated the business of the bankrupt as such receiver; that thereafter he was appointed trustee in bankruptcy and that he is now serving as such trustee; that he is not operating the bankrupt's business; that the assets of this estate include the furniture, fixtures, equipment and other miscellaneous items of the wholesale and retail bakery business formerly operated by the bankrupt; that the trustee offered the same for sale at public sale in the referee's Court, but that no satisfactory bid was received therefor, and that he was thereupon authorized by the Court to

sell the same at private sale, either in one lot or piece by piece, whichever way might appear to be most advantageous to this estate; that pursuant to said order the trustee has sold a number of items to various and sundry persons and that he expects to liquidate the balance of the items hereinbefore mentioned in the same manner; that the State Board of Equalization has [38] demanded that the trustee take out a retail sales tax permit and that he collect and remit the sales tax prescribed by the California Retail Sales Tax Act on sales made by him of the aforesaid items; that the trustee is of the opinion that in the liquidation of the assets of this estate he is not subject to the provisions of the said Act, but that he fears that if he does not collect the tax prescribed thereby, and it is later determined that he should have done so, that he might be surcharged for his failure so to do.

Findings, Conclusions and Order of the Referee

Your referee found the facts to be as hereinabove set forth and he concluded therefrom that while this estate is liable for the payment of sales taxes on sales made in the operation of the bankrupt's business, that the trustee in this case, in the liquidation of the assets of this estate, is not subject to the provisions of the California Retail Sales Tax Act and that he is not required to take out a retail sales tax permit or to collect or pay the retail sales tax prescribed by the said Act. Your referee further concluded that this Court has exclusive jurisdiction

to determine the liability of this estate, or its trustee, for the payment of taxes and that, therefore, it should not require the trustee, in liquidating the assets of this estate, to collect and remit the sales tax prescribed by the aforesaid Act and then sue in the State Court to recover the same. Your referee concluded that such a course, even if this Court should authorize it, might result in hopeless confusion and might unreasonably delay the administration of this estate, for the reason that, if the trustee collected sales taxes from those to whom he sold the assets of [39] this estate and it was then determined that he was not liable for such taxes, he would, under California law, be obliged to refund the same to those from whom the taxes had been collected. Your referee, therefore, concluded that the trustee's petition for a restraining order should be granted and he thereupon made the order from which this review is taken.

Papers Submitted

I hand up for the information of the Court the following papers:

1. Trustee's petition for restraining order, filed August 28, 1941.
2. Order to show cause dated August 28, 1941.
3. Restraining order against the State Board of Equalization, dated September 19, 1941.

4. Petition for review, filed September 23, 1941.

Respectfully Submitted this 9th day of October, 1941.

BENNO M. BRINK

Referee in Bankruptcy

[Endorsed]: Filed Oct. 9, 1941. [40]

[Title of District Court and Cause.]

MEMORANDUM OPINION ON REVIEW OF
REFEREE'S ORDER OF SEPTEMBER 19,
1941.

The petition for review presents three questions:

1. Is the trustee in bankruptcy required to procure a permit from the State Board of Equalization before he can sell assets of a bankrupt estate to purchasers for use or consumption?

2. Is such trustee liable for a sales tax on all such personal property so sold?

3. Has the referee power to enjoin a state officer in the enforcement of a state statute?

Heretofore Judge McCormick of this court in the matter of California Pea Products, Inc., a corporation, Bankruptcy file No. 32615-C, in a well considered opinion answered the first two questions in

the negative and the third question in the affirmative. I concur in his conclusions, consequently, there is no occasion for me to cover the same ground covered by him.

However, I feel certain features of his opinion should be amplified.

The sales tax is imposed upon retailers for the privilege of selling tangible personal property at retail. It is therefore a tax for the privilege of selling and while the act contemplates the tax shall be passed on to the consumer, at the same time the retailer is the one that is liable therefor, (*Western Lithograph Co. v. State* [41] *Board of Equalization*, 78 Pac. (2d) 731, 117 A. L. R. 838). In other words, the State Board of Equalization seeks to enforce upon the trustee of a bankrupt estate, the necessity of obtaining a license from the State of California in order that he may perform his mandatory duties under the Bankruptcy Act, and as a further privilege of the continuance of the performance of his duties, to pay a sales tax to said Board.

In *Oklahoma v. Texas*, 266 U. S. 298, 301, the Court said:

“* * * In all that the receiver has done he has been the Court’s agent and representative. In operating the oil wells in the area in dispute he was not engaged in a business or pursuing an occupation in the ordinary acceptance of those terms, but as an officer of the Court was

conserving the property within that area for the benefit of those to whom it ultimately might prove to belong. The State recognizes that all this is true, and so does not seek to subject the receiver to the taxes described but only to have them paid out of the proceeds of the oil production which are in his hands and ready to be paid over to those for whose ultimate benefit the wells have been operated.”

It seems clear to me that a trustee cannot be classified as a retailer, nor can he be classified as one engaged in the business of selling personal property at retail under the above authority.

Furthermore, the Act further provides “Any person, firm, partnership, corporation, etc., engaged in the business of selling tangible personal property at retail is subject to the tax”. No provision is made for the payment of said tax by trustees in bankruptcy.

In the case of *Reinecke v. Gardner*, 277 U. S. 239, 241, I find the following language used: [42]

“As under the bankruptcy act the entire property of the bankrupt vested in the trustee, the income in question was not the income of the bankrupt corporation, but of the trustee and was subject to income and excess profits tax only if the statutes authorized the assessment of the tax against him.”

And again at page 242, the Court stated:

“* * * A tax imposed on corporations alone does not extend to a trustee in bankruptcy of a corporation. See *United States v. Whitridge*, 231 U. S. 144; *Scott v. Western Pacific Ry.*, 246 F. 545; compare *Smietanka v. First Trust & Savings Bank*, 257 U.S. 602.”

In adopting 28 USCA 124a, it would appear that Congress provided for the payment of state taxes when the trustee conducts the business of the bankrupt to clarify the liability of trustees for the payment of taxes, and by implication excluded the collection of additional taxes as herein attempted. (25 R.C.L. 981-3; *Scott v. Western Pac. Ry.* 246 F. 545).

Certainly the bankruptcy courts do not have to seek permission from the State of California in order to function in this state, nor pay a tax for so functioning. The state not only demands that the bankruptcy court pay for a permit to sell the assets of a bankrupt estate, but to pay 3% of the sales to the user or consumer of such articles sold. The bankruptcy court is not concerned whether the purchaser is a user or consumer or whether he is buying said personal property for resale. The state seeks to place the additional duty upon the trustee of ascertaining the future use of said personal property.

If a trustee must pay a tax to the State of California for the privilege of selling assets of a bankrupt estate, then he must also pay to the City of Los Angeles its license fee for the same privilege. If he is "doing business" within the purview of the state law, he is by the same reasoning "doing business" under the licensing ordinance of the [43] City of Los Angeles. To so hold would be a substantial surrender of the exclusive jurisdiction of the bankruptcy courts.

In arriving at my conclusions, I am not unmindful of the present trend of judicial decisions in their broadening of the base for sales tax purposes as reflected in *Bigsby v. Johnson*, 6 Cal. Dec. 212, and *State of Alabama v. King and Boozer* decided by the Supreme Court of the United States on November 10, 1941.

The said order of the Referee is hereby confirmed and the attorney for the trustee is directed to forthwith submit the necessary order for my signature.

Dated: Los Angeles, California, December 4, 1941.

BEN HARRISON

Judge

[Endorsed]: Filed 2 P.M. Dec. 4, 1941. R. S. Zimmerman, Clerk. By Murray E. Wire, Deputy Clerk.

[44]

In the District Court of the United States
Southern District of California
Central Division

In Bankruptcy No. 36,845-BH

In the Matter of

DAVIS STANDARD BREAD COMPANY,
A Corporation,

Bankrupt,

ORDER DENYING PETITION FOR REVIEW
AND AFFIRMING ORDER OF REFEREE

The petition of the State Board of Equalization for a review of the order of Referee Benno M. Brink entered herein, restraining and enjoining the State Board of Equalization of California from attempting to compel the trustee in bankruptcy, L. Boteler, to take out a sales tax permit or to collect a three per cent retail sales tax for the State of California from purchasers of assets of this bankrupt estate in sales made by the trustee in liquidation of the bankrupt estate and not made in the operation of the bankrupt's former business, having come on for hearing pursuant to notice, before the undersigned Judge of the above named court on November 17, 1941, at the hour of 10 o'clock, A. M., on said date, and the trustee appearing by his Attorneys Messrs. Frank C. Weller and William E. Woodroof, Thomas S. Tobin of counsel, and the State Board of Equalization appearing

by Earl Warren, Attorney General of the State of California and Alberta Belford, Deputy Attorney General, and said matter having been argued and briefs having been submitted, and the Court having considered the same,

Finds, that the trustee, L. Boteler, beginning with [45] the second day of his tenure of office as trustee, has been liquidating the assets of the bankrupt; that he has collected, paid, or assumed responsibility for sales tax on all items of merchandise sold by him at retail; that he is now selling and disposing of equipment and assets belonging to the bankrupt estate to purchasers at private sale for the purpose of liquidation and is not operating the business of the bankrupt and is not selling such material and equipment as remains in his possession, at retail, but is converting the same into cash under provisions of Section 47-a of the Bankruptcy Act, and that the State Board of Equalization is seeking to require the trustee to take out a retail sales tax permit and to collect a three per cent sales tax on assets sold by him in liquidating said bankrupt estate.

The Court concludes, as a conclusion of law, that the State of California, has no right to require a trustee in bankruptcy liquidating the assets of a bankrupt estate, to take out a license from the State of California to permit him to perform the functions and duties imposed upon him under the provisions of Section 47-a of the Bankruptcy Act (11 USCA, Section 75-a).

The Court further concludes that the State of California or the State Board of Equalization thereof may not impose a retail sales tax on property as described in the trustee's petition and the order of the Referee, being converted into cash by sales to purchasers at private sale for the purpose of liquidation, and that to permit the State of California to impose these requirements on a trustee in bankruptcy in the performance of his statutory duties, would be an unwarranted invasion of the jurisdiction of the Bankruptcy [46] Courts and an impairment of its functions.

The Court further concludes that the trustee is entitled to a restraining order for the purpose of protecting him in the proper administration of this bankrupt estate, and that the restraining order issued by the Referee against the State Board of Equalization of the State of California was justified and proper.

In consideration of the foregoing and no error appearing on the part of the Referee, and on motion of Messrs. Frank C. Weller and William E. Woodroof, Attorneys for the Trustee, Thomas S. Tobin of counsel, it is

Ordered that the petition of the State Board of Equalization of the State of California be, and the same hereby is denied, and the order of the Referee is hereby in all respects affirmed.

Done at Los Angeles, in the Southern District of California, this 12th day of December, 1941.

BEN HARRISON

United States District Judge.

[Endorsed]: Filed Dec. 12, 1941. [47]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Above Entitled Court; and to L. Boteler as Trustee in Bankruptcy of Davis Standard Bread Company, a Corporation, Bankrupt, and to Messrs. Frank C. Weller and William E. Woodroof, His Attorneys Herein:

Notice is hereby given that the State Board of Equalization of the State of California hereby appeals to the United States Circuit Court of Appeals, in and for the Ninth Circuit, for review of the order of the United States District Court, in and for the Southern District of California, Central Division, made and entered on the 12th day of December, 1941, restraining and enjoining the State Board of Equalization of the State of California, its servants and employees, from attempting to compel L. Boteler as Trustee in Bankruptcy of Davis Standard Bread Company, a corporation, Bankrupt, to procure a license as a retailer under the California Retail Sales Tax Act and from attempting to compel L. Boteler as Trustee in Bankruptcy of Davis

Standard Bread Company, a corporation, Bankrupt, to collect of purchasers a retail sales tax on sales of the assets of said bankrupt estate sold piecemeal to consumers and to pay the tax to the State Board of Equalization [48] of the State of California.

Dated: January 8, 1942.

EARL WARREN,

Attorney General of the
State of California

By ALBERTA BELFORD

Deputy Attorney General,
Attorneys for State Board
of Equalization of the
State of California

(Affidavit of service shows service by mail Jan. 8, 1942, on attorneys for the Trustee)

[Endorsed]: Filed Jan. 9, 1942, copy mailed to Trustee's Attys. 1/15/42. R. S. Zimmerman, Clerk.
E.L.S. [49]

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS

Comes now the petitioner, State Board of Equalization of the State of California, by its attorneys, and files and presents to the court its Assignment of Errors whereby said petitioner assigns as error in the records and proceedings of the District Court of

the United States, Southern District of California, Central Division, the following particulars and errors:

(1) That the Court erred in affirming the order of the Referee in Bankruptcy restraining the State Board of Equalization from asserting any claim for retail sales tax under the provisions of the California Retail Sales Tax Act by reason of certain sales made by him as Trustee in Bankruptcy of the above entitled bankrupt estate;

(2) That the court erred in concluding that the sales made by L. Boteler as Trustee in Bankruptcy of certain assets belonging to the said bankrupt estate to purchasers at private sale for the purpose of liquidation were not retail sales within the meaning of the California Retail Sales Tax Act.

Dated: January 8, 1942.

EARL WARREN,

Attorney General of the
State of California,

By ALBERTA BELFORD,

Deputy Attorney General,
Attorneys for State Board of
Equalization of the State of
California.

[Endorsed]: Filed Jan. 9, 1942.

(Affidavit of service by mail on Attys. for Trustee Jan. 14, 1942) [50]

[Title of District Court and Cause.]

ORDER ALLOWING APPEAL

Upon reading the Application for Appeal, and upon all of the records and files herein,

It is hereby ordered that an appeal be and the same is hereby allowed to the State Board of Equalization of the State of California to have the United States Circuit Court of Appeals, in and for the Ninth Circuit, review the order of the United States District Court, in and for the Southern District of California, Central Division, made and entered on the 12th day of December, 1941, restraining and enjoining said State Board of Equalization of the State of California, its servants and employees, from attempting to compel L. Boteler as Trustee in Bankruptcy of Davis Standard Bread Company, a corporation, Bankrupt, to procure a license as a retailer under the California Retail Sales Tax Act and to compel L. Boteler as said Trustee in Bankruptcy to pay a retail sales tax upon all sales made by him of the assets of said Davis Standard Bread Company, a corporation, Bankrupt.

It Is Hereby Further Ordered that citation be issued as provided by law and that a transcript of the record be prepared by the Clerk of the United States District Court [51] in and for the Southern District of California, Central Division, and transmitted to said United States Circuit Court of Appeals, in and for the Ninth Circuit, so that said

United States Circuit Court of Appeals, in and for the Ninth *Court*, shall have the same in said court within thirty (30) days from the 7th day of January, 1942.

It Is Hereby Further Ordered that cost bond in said appeal be and the same is hereby fixed at \$250.00, the Clerk to approve said bond.

Dated this 12th day of January, 1942.

PAUL J. McCORMICK

Judge of the United States District Court, acting and performing aforesaid duty in place of Judge Ben Harrison, who is unable to act by reason of sickness, under Rule 63, R. C. P.

[Endorsed]: Filed Jan. 12, 1942. [52]

The premium charged for this bond is \$10.00 Dollars per annum.

4542048

In the District Court of the United States,
For the Southern District of California,
Central Division

In the Matter of Davis Standard Bread Company,
a corporation,

Bankrupt,

L. Boteler, Trustee,

Respondent,

vs.

State Board of Equalization of the State of California,

Appellant.

COST BOND ON APPEAL

Know All Men by These Presents, That we, Fidelity and Deposit Company of Maryland, a corporation duly organized and doing business under and by virtue of the laws of the State of California and duly qualified for the purpose of making, guaranteeing or becoming surety upon bonds or undertakings required or authorized by the laws of the United States of America, as Surety, is held and firmly bound unto L. Boteler, Trustee of the Davis Standard Bread Company, a corporation, Bank-

rupt, in the penal sum of Two hundred fifty and no/100 (\$250.00) Dollars, to be paid to said L. Boteler, Trustee of the Davis Standard Bread Company, a corporation, Bankrupt, their heirs and assigns, for which payment well and truly to be made the Fidelity and Deposit Company of Maryland binds itself, its successors and assigns firmly by these presents.

Signed, sealed and dated this 13th day of January, 1942. [53]

The Condition of the Above Obligation Is Such That Whereas, the State Board of Equalization of the State of California, Appellant in the above entitled suit, is about to take an appeal to the United States Circuit Court of Appeals for the Ninth *District*, to reverse a decree made, rendered and entered on the 12th day of December, 1941, by the District Court of the United States for the Southern District of California, Central Division, in the above entitled cause, confirming an order made prior thereto by Benno Brink, Referee, and in favor of the Trustee and Respondent as in said decree set forth.

Now therefore, the condition of the above obligation is such that if the State Board of Equalization of the State of California, Appellant, shall prosecute their said appeal to effect and answer all costs which may be adjudged against them if they fail to make good their appeal, then this obligation

shall be void; otherwise to remain in full force and effect.

FIDELITY AND DEPOSIT
COMPANY OF MARYLAND

(Seal) By D. M. LADD

Attorney in Fact

Attest THERESA FITZGIBBONS

Agent

Examined and recommended for approval as provided in Rule No.

.....
Attorney

State of California,
County of Los Angeles—ss:

On this 13th day of January, 1942, before me, S. M. Smith, a Notary Public, in and for the said County of Los Angeles, State of California, residing therein, duly commissioned and sworn, personally appeared D. M. Ladd, known to me to be the Attorney-in-Fact, and Theresa Fitzgibbons, known to me to be the Agent of the Fidelity and Deposit Company of Maryland, the Corporation that executed the within instrument, and acknowledged to me that they subscribed the name of the Fidelity and Deposit Company of Maryland thereto and their own names as Attorney-in-Fact and Agent, respectively.

[Seal] S. M. SMITH

Notary Public in and for the County of Los Angeles, State of California.

My Commission expires Feb. 18, 1942.

I hereby approve the foregoing bond, dated the 15th day of January, 1942.

PAUL J. McCORMICK,
Judge.

[Endorsed]: Filed Jan. 15, 1942. [54]

[Title of District Court and Cause.]

DESIGNATION OF TRANSCRIPT

To the Clerk of the Above Entitled Court:

Pursuant to the appeal from the order of the above entitled court in the above entitled proceeding, which notice of appeal was filed on the 9th day of January, 1942, and order allowing appeal signed by the court and filed on the 12th day of January, 1942, you are hereby requested and instructed to certify to the United States Circuit Court of Appeals, in and for the Ninth Circuit, at San Francisco, California, by the 6th day of February, 1942, two certified copies of each of the following portions of the transcript of the record in the above entitled proceeding:

- (1) Petition in Bankruptcy;
- (2) Order of the court appointing L. Boteler as Trustee in Bankruptcy;
- (3) Petition of L. Boteler as Trustee in Bankruptcy for Injunction, addressed to Honorable Benno M. Brink, Referee in Bankruptcy, together

with Order to Show Cause issued upon said petition, served upon the State Board of Equalization of the State of California on September 2, 1941;

(4) Order of Benno M. Brink, Referee in Bankruptcy, [55] restraining the State Board of Equalization of the State of California from presenting its claim for retail sales tax, which order commences as follows:

“The petition of the trustee for a restraining order coming on for hearing before the undersigned Referee in Bankruptcy at his Court Room in the United States Post Office and Court House on the 15th day of September, 1941, at the hour of 2 o'clock, P. M. * * * .”;

(5) Petition of the State Board of Equalization of the State of California to the District Court of the United States, Southern District of California, Central Division, for Review of the Restraining Order of Benno M. Brink, Referee in Bankruptcy, dated September 18, 1941, and signed by J. J. Campbell, petitioner;

(6) Referee's Certificate on Petition for Review by State Board of Equalization, dated October 9, 1941, and signed by Benno M. Brink, Referee in Bankruptcy;

(7) Order of United States District Court, Southern District of California, Central Division, denying petition for Review and affirming the Order of the Referee, Benno M. Brink, dated December 12, 1941, and signed by Ben Harrison, United States District Judge;

(8) Notice of Appeal dated January 8, 1942;

(9) Order Allowing Appeal dated January 12, 1942; and

(10) Order Approving Appeal Bond.

Dated: January 14, 1942.

EARL WARREN,

Attorney General of the State
of California,

By ALBERTA BELFORD

Deputy Attorney General,
Attorneys for State Board
of Equalization of the State
of California, Appellant.

[Endorsed]: Filed 4:44 P.M. Jan. 15 1942. R. S. Zimmerman, Clerk. By M. M. Karcher, Deputy Clerk.

(Served by mail Jan. 14, 1942, on Attys. for Trustee as shown by affidavit.) [56]

[Title of District Court and Cause.]

SUPPLEMENTAL DESIGNATION
OF TRANSCRIPT

To the Clerk of the Above Entitled Court:

Pursuant to the appeal from the order of the above entitled court in the above entitled proceeding, which notice of appeal was filed on the 9th day

of January, 1942, and order allowing appeal signed by the court and filed on the 12th day of January, 1942, and supplemental and in addition to all of the transcript of the record hereinbefore designated, you are hereby requested and instructed to certify to the United States Circuit Court of Appeals, in and for the Ninth Circuit, at San Francisco, California, by the 6th day of February, 1942, two certified copies of the following document:

Order Adjudging Debtor Bankrupt, directing Bankruptcy be proceeded with, Referring said Cause to a Referee, Appointing a Receiver and Fixing Time and Place for Hearing of Trustee's Accounts and Reports and Applications for Fees, which order was signed by Judge Ben Harrison and filed on July 30, 1941.

Dated: January 23, 1942.

EARL WARREN,

Attorney General

By ALBERTA BELFORD,

Deputy.

Attorneys for State Board of
Equalization of the State of
California.

[Endorsed]: Filed Jan. 24, 1942.

(Served on Attys. for Trustee, Jan. 23, 1942, by mail. Service shown by affidavit.) [57]

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated by and between the parties hereto, through their respective counsel, that the Order Appointing L. Boteler as Trustee in Bankruptcy of Davis Standard Bread Company, a corporation, Bankrupt, which order is a part of the records and files of the Referee in Bankruptcy in the above entitled proceeding, may with the approval of the above entitled court be incorporated in and made a part of the transcript of the record on appeal to the United States Circuit Court of Appeals, in and for the Ninth Circuit, which appeal was taken by the State Board of Equalization of the State of California from the order of the District Court of the United States, Southern District of California, Central Division, made and entered in the above entitled matter on December 12, 1941, affirming the order of Honorable Benno M. Brink, Referee in Bankruptcy, which order of said Referee in Bankruptcy enjoined and restrained the State Board of Equalization of the State of California from asserting any right against the said Trustee in Bankruptcy for retail sales tax for sales made by said Trustee after adjudication in bankruptcy.

Dated: January 23, 1942. [58]

FRANK C. WELLER and
WILLIAM E. WOODROOF,
By THOMAS S. TOBIN

Attorneys for L. Boteler as
Trustee in Bankruptcy
herein.

EARL WARREN,
Attorney General of the State
of California,
By ALBERTA BELFORD
Deputy Attorney General,
Attorneys for State Board
of Equalization of the State
of California.

The incorporation of the aforesaid document as a part of the transcript on appeal to the United States Circuit Court of Appeals, in and for the Ninth Circuit, in accordance with the foregoing stipulation, is hereby approved this 27th day of Jan., 1942.

PAUL J. McCORMICK,
Judge of the United States
District Court.

[Endorsed]: Filed Jan. 29, 1942. R. S. Zimmerman, Clerk. By, Deputy. [59]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, R. S. Zimmerman, Clerk of the District Court of the United States, do hereby certify that the foregoing pages numbered from 1 to 59 inclusive contain full, true and correct copies of Debtor's Petition; Order Adjudging Debtor Bankrupt; Order Approving Appointment of Trustee by Referee; Petition of Trustee for Restraining Order; Restraining Order by Referee; Petition for Review; Certificate of Referee on Review; Memorandum Opinion of District Judge; Order Denying Petition for Review and Affirming Order of Referee; Notice of Appeal; Assignment of Errors; Order Allowing Appeal; Cost Bond on Appeal; Order Approving Cost Bond on Appeal; Designation of Record on Appeal; Supplemental Designation; and Stipulation as to Record on Appeal, which constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the fees of the clerk for comparing, correcting and certifying the foregoing record amount to \$16.40, which amount has been paid to me by Appellant.

Witness my hand and the seal of the said District Court this 5th day of February, A. D. 1942.

[Seal]

R. S. ZIMMERMAN,

Clerk,

By EDMUND L. SMITH

Deputy.

[Endorsed]: No. 10021. United States Circuit Court of Appeals for the Ninth Circuit. State Board of Equalization of the State of California, Appellant, vs. L. Boteler, Trustee in Bankruptcy of the Estate of Davis Standard Bread Company, a corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed February 7, 1942.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
In and for the Ninth Circuit

No. 10021

In the Matter of

DAVIS STANDARD BREAD COMPANY,
a Corporation,

Bankrupt.

APPELLANT'S DESIGNATION OF POINTS
ON APPEAL AND RECORD IN SUPPORT
THEREOF.

Appellant, State Board of Equalization of the State of California, hereby designates as "Appellant's Points on Appeal" those certain "Assign-

ments of Error”, appearing at page 50 of the Original Certified Record, and Appellant hereby designates as the “Record on Appeal” all of the record heretofore certified to the United States Circuit Court of Appeals from the United States District Court in the above entitled cause.

Dated: February 20, 1942.

EARL WARREN,

Attorney General of the State
of California,

By ALBERTA BELFORD,

Deputy Attorney General,
Attorneys for Appellant.

State of California,

County of Los Angeles—ss.

C. R. Dusol, being first duly sworn, deposes and says:

That she is a citizen of the United States, resident of Los Angeles County, over eighteen years of age, not a party to the within cause, and employed as a clerk in the Los Angeles office of the Attorney General of the State of California, who is one of the attorneys for Appellant in the above entitled matter; that Messrs. Craig & Weller appears in said cause as attorney for Respondent L. Boteler and have offices at 111 W. Seventh St., Los Angeles, California; that in each of said places there is delivery service by United States mail, and between said two places there is regular communication by

mail; that affiant enclosed a copy of Appellant's Designation of Points on Appeal and Record in Support in an envelope addressed to said Messrs. Craig & Weller, 111 W. Seventh St., Los Angeles, California; that affiant sealed said envelope and deposited the same in the United States Post Office at Los Angeles, California, on the 20th day of February, 194....., with postage thereon fully prepaid.

C. R. DUSOL

Subscribed and sworn to before me this 20th day of February, 1942.

EARL WARREN,

Attorney General,

By ALBERTA BELFORD

Deputy Attorney General.

[Endorsed]: Filed Feb. 21, 1942. Paul P. O'Brien,
Clerk.

No. 10021

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA,

Appellant,

vs.

L. BOTELER, Trustee in Bankruptcy of the Estate of
DAVIS STANDARD BREAD COMPANY, a corporation,

Appellee.

APPELLANT'S OPENING BRIEF.

EARL WARREN,

Attorney General of the State of California,

By ALBERTA BELFORD,

Deputy Attorney General,

600 State Building, Los Angeles,

*Attorneys for Appellant, State Board of Equalization of
the State of California.*

FILED

MAY - 1 1942

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No. 10021

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA,

Appellant,

vs.

L. BOTELER, Trustee in Bankruptcy of the Estate of
DAVIS STANDARD BREAD COMPANY, a corporation,

Appellee.

APPELLANT'S OPENING BRIEF.

Statement of Jurisdictional Facts.

Davis Standard Bread Company, a corporation, filed a debtor's petition under Chapter X of the National Bankruptcy Act with the District Court of the United States, Southern District of California, Central Division, on or about the 5th day of August, 1940. [See Tr. of Record pp. 2-23.]

Davis Standard Bread Company, a corporation, was adjudicated a bankrupt, and a Trustee in Bankruptcy was appointed on or about the 14th day of August, 1941, by

the United States District Court, Southern District of California, Central Division. [See Tr. of Record pp. 24-30.]

Trustee in Bankruptcy, L. Boteler, filed with Benno M. Brink, Referee in Bankruptcy, on the 9th day of October, 1941, a Petition for a Restraining Order asking that the Referee restrain the State Board of Equalization of the State of California from attempting to collect the California Retail Sales Tax from the Trustee in Bankruptcy upon sales made by the Trustee of the assets of the bankrupt estate. [See Tr. of Record pp. 31-34.]

After a hearing duly and regularly had before the Referee in Bankruptcy, the facts not being in dispute, the Referee in Bankruptcy, Benno M. Brink, did on the 19th day of September, 1941, issue a Restraining Order against the State Board of Equalization enjoining and restraining the State Board of Equalization from attempting to collect any sales tax on any items of the bankrupt estate sold to purchasers in connection with the liquidation thereof except such sales as had been made in the usual course of retail business and in the actual operation thereof. [See Tr. of Record pp. 36-38.]

On September 23, 1941, the State Board of Equalization filed with the United States District Court its Petition for Review of the Order of the Referee in Bankruptcy, together with its assignment of errors. [See Tr. of Record pp. 38-41.]

Thereupon the Record of Proceedings was regularly certified to the District Court by the Referee. [See Tr. of Record pp. 42-47.]

Thereafter the District Court made its Order confirming the Order of the Referee. (See Order of Benjamin Harrison, Judge, filed December 4, 1941.) [See Tr. of Record pp. 47-51.]

(See Order of Benjamin Harrison, Judge, filed December 12, 1941.) [See Tr. of Record pp. 52-55.]

Thereafter, and on the 9th day of January, 1942, the State Board of Equalization, by its attorney, Earl Warren, Attorney General of the State of California, filed its Notice of Appeal with the United States District Court, together with a Stipulation to the effect that the amount of the claim involved was in excess of \$500.00. [See Tr. of Record p. 55.]

Abstract of the Case.

There is no issue of fact in the present case. The facts set forth in the petition for the restraining order were admitted. The facts recited by the Judge of the District Court in his order are true. [Tr. of Record p. 52.] The issue raised at all times was one of law alone. The question presented is whether or not a trustee in bankruptcy selling assets of the bankrupt estate is exempt from paying the California Retail Sales Tax by reason solely of the fact that he is a trustee in bankruptcy. In other words, whether or not sales which would otherwise be taxable as retail sales within the State of California are not taxable as retail sales because they are sold by the trustee in bankruptcy in the liquidation of a bankrupt estate.

Assignment of Errors.

The appellant, State Board of Equalization of the State of California, by its attorneys, presents to the court its Assignment of Errors whereby said appellant assigns as error in the records and proceedings of the District Court of the United States, Southern District of California, Central Division, the following particulars and errors:

(1) That the Court erred in affirming the order of the Referee in Bankruptcy restraining the State Board of Equalization from asserting any claim for retail sales tax under the provisions of the California Retail Sales Tax Act by reason of certain sales made by him as Trustee in Bankruptcy of the above entitled bankrupt estate;

(2) That the Court erred in concluding that the sales made by L. Boteler as Trustee in Bankruptcy of certain assets belonging to the said bankrupt estate to purchasers at private sale for the purpose of liquidation were not retail sales within the meaning of the California Retail Sales Tax Act.

ARGUMENT.

I.

Piecemeal Selling of Tangible Personal Property Constitutes Doing Business as a Retailer in the State of California Within the Provisions of the California Retail Sales Tax Act.

Section 3 of the California Retail Sales Tax Act provides:

“For the privilege of selling tangible personal property at retail a tax is hereby imposed upon retailers at the rate of * * * three per cent of the gross receipts of any such retailer from the sale of all tangible personal property sold at retail in this State on and after July 1, 1935; * * *.”

A “retailer” is defined in Section 2(e) of said Act as follows:

“‘*Retailer*’ includes every person engaged in the business of making sales at retail * * * of tangible personal property * * *.”

A “retail sale” or “sale at retail” is defined in Section 2(c) of said Act as follows:

“A ‘*retail sale*’ or ‘*sale at retail*’ means a sale to a consumer or to any person for any purpose other than for resale in the regular course of business in the form of tangible personal property, * * *.”

Section 17 of the Retail Sales Tax Act provides:

“* * *

“*For the purpose of the proper administration of this act and to prevent evasion of the tax hereby im-*

*posed it shall be presumed that all gross receipts are subject to the tax hereby imposed until the contrary is established. * * *."*

"*Business*" is defined in Section 2(d) of said Act as follows:

"* * * any activity engaged in by any person or caused to be engaged in by him with the object of gain, benefit or advantage, either direct or indirect."

From these definitions it is clear that the Trustee in Bankruptcy, in selling the machinery and miscellaneous assets of Davis Standard Bread Company, was engaged in the business of selling at retail for the benefit of the creditors of that company.

It is argued by the attorneys for the Trustee that because these sales are sales of the capital assets of the business rather than sales of the merchandise of the retail bakery business, they are sales of a casual and incidental nature and are not a part of the usual retail business of the bakery and are, therefore, not subject to the Retail Sales Tax Act. This proposition has been negatived by the Supreme Court of the State of California in the very recent case of *Carl M. Bigsby v. Charles G. Johnson, State Treasurer*, decided Oct. 28, 1941, and appearing at page 931 of the *Advanced California Reports*, 18 A. C. of No. 26, p. 931; 6 C. D. 212. This case, decided since the signing by the Referee of the restraining order herein directed to the State Board of Equalization, holds that the sale by a retailer of the capital assets of his business is a sale subject to the sales tax. The property sold in that case was a Monomelt pot and its accessories, which

constituted a capital asset in the nature of machinery and equipment and was no part of the merchandise ordinarily sold by Bigsby. The Supreme Court, after quoting the sections of the Act heretofore cited, said (p. 934):

“The question arises, therefore, whether the legislature intended to include in the measure of the tax the receipts from those retail sales of a retailer that are incidental and casual, as well as from the retail sales that are made in the ordinary course of business. Although most jurisdictions imposing sales taxes specifically exempt casual or isolated sales, a majority of them hold that the exemption does not include casual retail sales made in the course of business operations by one who is engaged in the retail sales business. (Prentice-Hall, *State & Local Tax Service*, pars. 92,572, 92,953.) The tax is imposed upon retailers for the privilege of doing a retail sales business (*Western Lithograph Co. v. State Board of Equalization*, 11 Cal. (2d) 156, 164 (78 Pac. (2d) 731, 117 A. L. R. 838)), and the measure of the tax is the gross receipts of any such retailer from the sale of ‘all tangible personal property sold at retail. . . .’ (Act 8493, sec. 3.) The plaintiff is a retailer. He sold the personal property in question at retail as a part of his business operations, and the plain language of the act requires the inclusion of the gross receipts therefrom in the measure of the tax. He can claim no exemption merely by virtue of the fact that the sale of used printing equipment was not the kind of retail sale ordinarily made by him. Our statute creates no exemption covering the situation, and however forceful may be plaintiff’s contention that this type of sale should be exempted from the operation of the statute, such arguments must be directed to the legislature rather than to the courts.”

The California Supreme Court in the case of *Western Lithograph Co. v. State Board of Equalization*, 11 Cal. (2d) 156, 164, held that the retail sales tax is a tax imposed for the privilege of making sales at retail in the State of California. A sale at retail is any sale other than a sale for resale. This Trustee in Bankruptcy is engaged in making sales at retail for the benefit of the creditors of Davis Standard Bread Company, Bankrupt. He is therefore engaged in the business of selling at retail and is subject to the Sales Tax Act. The construction of a State statute placed thereon by a State court is binding upon the Federal courts. (*Erie Ry. Co. v. Tompkins*, 304 U. S. 64, 58 S. Ct. Rep. 817; see also *Ruhlin v. New York Life Insurance Co.*, 304 U. S. 202, 58 S. Ct. 860, at 862.)

In the case of *Union League Club v. Johnson*, decided by the Supreme Court of California in July, 1941 (18 A. C. 257), the court upheld a sales tax upon liquor sold at a social club. The court there said (p. 260):

“It is significant that the statute does not include the word ‘profit’ in its definitions but imposed a tax upon the transactions of one conducting business ‘with the object of gain, benefit or advantage, either direct or indirect.’ Assuming that no profit was either intended or realized by the club from the operations of its dining rooms and bar, it does not follow that there was no ‘gain, benefit or advantage.’ Few persons would go to a club without these facilities and they undoubtedly largely contribute to the success of such an enterprise. In construing a statute using the identical language of our own, the Su-

preme Court of Iowa aptly remarked: “‘Profit’ may be said to be ‘gain, benefit, or advantage,’ but ‘gain, benefit, or advantage’ does not necessarily mean only ‘profit’.” (*State v. Zellner*, 133 Ohio St. 263 (13 N. E. (2d) 235).)”

Section 124-a, Title 28, of the United States Code annotated provides:

“Any receiver, liquidator, referee, trustee or other officers or agents appointed by any United States court who is authorized by said court to conduct any business, or who does conduct any business, shall, from and after June 18, 1934, be subject to all State and local taxes applicable to such business the same as if said business were conducted by an individual or corporation: *Provided, however,* That nothing in this section contained shall be construed to prohibit or prejudice the collection of any such taxes which accrued prior to June 18, 1934, in the event that the United States court having final jurisdiction of the subject matter under existing law should adjudge and decide that the imposition of such taxes was a valid exercise of the taxing power by the State or States, or by the civil subdivisions of the State or States imposing the same. (June 18, 1934, c. 585, 48 Stat. 993.)”

In other words, the Trustee in Bankruptcy is liable for any State Tax imposed for the *conducting of any business*. This does not mean that he, as Trustee in Bankruptcy, must necessarily conduct the retail bakery business of the bankrupt in order to be subject to the tax in the instant case. If he is selling the machinery and equipment at retail, he is conducting a retail business within the mean-

ing of the Act, even though, as was said in the *Bigsby* case, *supra*, it is not the same kind of business for which the company was originally organized, and for which the said corporation originally obtained the permit. Suppose no bankruptcy had been had; suppose the officers of the company for the benefit of the creditors had sold out the assets of the business, there is no question but that under the *Bigsby* case those officers would have been liable for the tax. The mere fact that the Trustee in Bankruptcy is substituted in the place of the original managers of the business for the purpose of selling out the assets for the benefit of the creditors does not vary the rule.

An excellent case upon the construction of Section 124-a, Title 28, U. S. C. A., is *Boteler v. Ingels*, 308 U. S. 57, 521, 60 S. Ct. 29. In that case the United States Supreme Court emphatically reiterates that the State has the right to impose upon Trustees in Bankruptcy the same obligations for the same privileges that they impose upon private citizens. There is no doubt that if Mr. Boteler, acting for the corporation, were selling these assets, he would be liable under the Retail Sales Tax Act. The mere fact that he is acting under order of the Federal Court does not exempt him from this tax. (See also *Gillis v. State of California*, 293 U. S. 62, 55 S. Ct. 4, 79 L. Ed. 199.)

The payment of this tax is not a charge upon the estate. It is the duty of the Trustee in Bankruptcy to collect this tax from the purchasers and to pay it into the State Treasury. He performs this duty in return for the privilege of

selling to consumers and not for resale in the State of California. (Sec. 8½, Retail Sales Tax Act.) That section provides for such reimbursement. In the case of *De Aryan v. Akers*, 12 Cal. (2d) 781, at 785, the court said:

“The pertinent provisions of the act indicate that the legislature recognized the obvious economic necessity of the retailer’s recoupment of the tax from sales, and that some such method as that adopted by it for reimbursement was also necessary if the small and independent tradesman was to remain in business. It also distinctly indicated, however, that the provision for the method of reimbursement should not disturb the relationship of sovereign and taxpayer created between the state and the retailer. * * * When properly understood, in connection with the other parts of the act, the provisions of sections 8½ and 9 here involved must be considered valid and enforceable.”

The legislature has not exempted sales made by Receivers and Trustees in Bankruptcy from the operation of this statute, as it could have done had it intended said sales to be exempt and as it has done in other statutes. (See Sec. 2-c-1 of the Corporate Securities Act, Deering’s General Laws, Act No. 3814, General Laws of California, Statutes of 1917, p. 673, as amended.)

It is respectfully submitted that the Trustee, having actually exercised the privilege of selling tangible personal property at retail in this State as a retailer, as defined in the statute here under consideration, and as construed in the *Bigsby* case, *supra*, should apply for and procure a per-

mit as provided by Section 12 of the Retail Sales Tax Act and report and pay to the State of California 3% of the gross receipts on all of his retail sales as hereinabove and in said Act defined, reimbursing himself and the estate therefor as provided for and permitted by Section 8½ of said Act.

This Court well knows that Trustees in Bankruptcy sell thousands of dollars worth of tangible personal property in California every year. The *primary* function of a Trustee in Bankruptcy is to sell the assets of the bankrupt estate. All of these sales are presumed to be at retail. (Retail Sales Tax Act, Sec. 17.) The tax is not a burden upon the estate since the Trustee has the duty of collecting it from the purchaser. Unless these Trustees are subject to the Retail Sales Tax Act they may come into their market with a 3% advantage over all other sellers in the State. This was not the purpose and intent of either the Retail Sales Tax Act or the Bankruptcy Act.

Respectfully submitted,

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CALIFORNIA RETAIL SALES TAX ACT

AS IN EFFECT SEPTEMBER 13, 1941



PUBLISHED UNDER AUTHORITY OF
STATE BOARD OF EQUALIZATION
SACRAMENTO

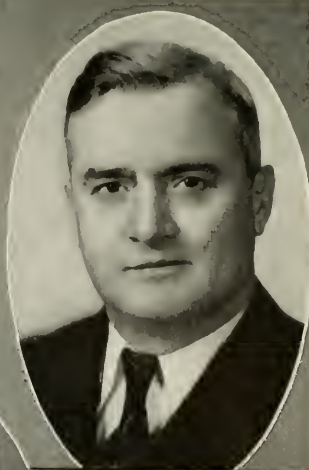
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ANALYSIS OF ACT

(1) **Nature of the tax.** The tax is imposed upon retailers for the privilege of selling tangible personal property at retail.

(2) **Rate of tax.** The tax is imposed at the rate of 3 per cent of the gross receipts from retail sales of tangible personal property sold on and after July 1, 1935. The rate of the tax was $2\frac{1}{2}$ per cent of the gross receipts from retail sales made from August 1, 1933, to and including June 30, 1935.

(3) **Who are taxable.** Any person, firm, partnership, corporation, etc., engaged in the business of selling tangible personal property at retail is subject to the tax.

Receipts from sales by manufacturers, jobbers and wholesalers are taxable when the sales are made in the course of their business to purchasers for use or consumption and not for resale.

The tax does not apply to the gross receipts from isolated or occasional sales of tangible personal property not sold or used in the course of business operations.

(4) **Nontaxable sales.** (a) **Sales of tangible personal property for the purpose of resale**, either in the form in which sold or when an ingredient or component part of other tangible personal property.

(b) **Sales of real property.**

(c) **Sales of intangible personal property**, such as book accounts, stocks, bonds, mortgages, notes and other evidences of debt.

(d) **Sales of theater tickets**, railroad, stage and admission tickets of all kinds.

(e) **Sales which California is prohibited from taxing** under the Federal or State Constitution.

(f) **Sales of gas, electricity and water** when delivered to consumers through mains, lines, or pipes.

(g) **Sales of gold bullion**, gold concentrates or gold precipitates by the producer or refiner thereof.

(h) **Sales of tangible personal property used for the performance of a contract on public works executed prior to August 1, 1933.**

(i) **Sales of food products for human consumption.** The term "food products" does not include candy, confectionery, spirituous, malt or vinous liquors, soft drinks, sodas or beverages such as are ordinarily dispensed at bars or soda fountains or in connection therewith, medicines, tonics, and preparations in liquid, powdered, granular, tablet, capsule, lozenge, and pill form sold as dietary supplements or adjuncts, or meals served on or off the premises of the retailer or drinks or foods furnished, prepared or served for con-

sumption at tables, chairs or counters or from trays, glasses, dishes or other tableware provided by the retailer.

(j) **Sales to the United States** or any agency or instrumentality thereof except a corporate agency or a corporate instrumentality.

(k) **Sales of vessels** of more than 1,000 tons burden by the builders thereof.

(l) **Sales of silver bullion** by the producer or refiner thereof.

(m) **Sales of motor vehicle fuel** subject to the tax imposed by the "Motor Vehicle Fuel License Tax Act" and not subject to refund. If subject to refund, the sales tax is collected by deduction from the refund.

(n) **Sales of any publication** regularly issued at average intervals not exceeding one month and of tangible personal property which becomes an ingredient or component part of any such publication.

(o) **Sales of live stock and poultry** of a kind the products of which ordinarily constitute food for human consumption.

(5) **What is required of sellers.** (a) Every person, firm, partnership, corporation, etc., engaging in the business of selling tangible personal property, the gross receipts from the retail sale of which are required to be included in the measure of the sales tax, must apply to the State Board of Equalization for a permit on a form prescribed by the board. Wholesalers, as well as retailers, must secure such permit. The application must be accompanied by a fee of one dollar (\$1) for each permit.

(b) A separate permit must be secured for each place of business, must be conspicuously displayed at the place for which issued and is valid until suspended or revoked by the board.

(c) Quarterly returns must be filed with the board within 15 days after the end of each quarterly period, except that the board may require, in some cases, filing of returns for other than quarterly periods.

(d) Returns are to be made on forms prescribed by the board and must be accompanied by a remittance of the amount of tax due, payable to the State Board of Equalization.

(e) Failure to pay any tax or assessment within the time required by the act will result in the imposition of a 10 per cent penalty.

(f) If returns are not filed, an assessment of the amount of tax due will be made and a 10 per cent penalty added thereto.

(g) Sellers must maintain complete records of all their gross receipts.

(6) **Disposition of proceeds.** All collections are deposited in the State Treasury to the credit of the Retail Sales Tax Fund. After deductions for administrative expense and allowance of refunds for any erroneous collections and payments, the balance in such fund

is transferred to the General Fund to be expended for the support of the State Government and the public school system.

(7) **Relationship to use tax.** Attention of sellers of tangible personal property is directed to the Use Tax Act administered by the State Board of Equalization in conjunction with the Retail Sales Tax Act. Imposed at the same rate as the sales tax, namely 3 per cent of the sales price, the use tax applies to such amounts when tangible personal property is purchased from retailers for storage, use, or consumption in California, except when the gross receipts from the sale of the property are subject to the sales tax here or in those cases where an exemption is provided, as for food products and motor vehicle fuel. The principal application of the use tax is with respect to property purchased outside of California or in inter-state commerce for use here.

If retailers maintain places of business in California they are required to collect the use tax whenever they make sales of tangible personal property with respect to which that tax applies. Such transactions should be reported along with the sales tax and an appropriate space is provided for that purpose in the forms for return. Retailers who do not maintain places of business in California may be authorized to collect the use tax from their customers, after securing certificates of such authority, upon compliance with conditions prescribed by the State Board of Equalization. Whenever the use tax is not collected by the seller it must be paid directly to the board by the purchaser. Accordingly, retailers may be responsible for the use tax either as sellers or purchasers of property; typical examples of liability for use tax as purchasers are with respect to furniture, stationery, office supplies, advertising matter, and plant equipment bought for use here from out-of-State sellers who do not maintain places of business in California or who have not been authorized to collect the use tax from their purchasers.

Retail Sales Tax Act

An act imposing a tax for the privilege of selling, renting, leasing, producing, fabricating, processing, printing or imprinting tangible personal property and for the privilege of furnishing, preparing or serving tangible personal property, providing for permits to sellers of tangible personal property, providing for the levying, assessing, collecting, paying and disposing of such tax, making an appropriation for the administration hereof, prescribing penalties for violations of the provisions hereof, and providing this act shall take effect immediately. [Statutes 1939, p. 2169; operative July 1, 1939.]

History.—Enacted Stats. 1933, p. 2599. Stats. 1935, p. 1256, added the words “renting or leasing.” Stats. 1939, p. 2169, added the words “producing, fabricating, processing, printing or imprinting” and changed “retailer” to “seller of tangible personal property.”

(Approved July 31, 1933. Stats. 1933, p. 2599; amended by Stats. 1935, pp. 1225, 1252 and 1256; Stats. 1937, pp. 1326 and 2222, and by Stats. 1939, pp. 1224, 1890, 1906 and 2170; Stats. (First Extra Session) 1940, Chaps. 32, 46 and 50; Stats. 1941, Chaps. 247, 681 and 767.)

SHORT TITLE

SECTION 1. This act is known and may be cited as the “Retail Sales Tax Act of 1933.” [Original section; Statutes 1933, p. 2599.]

DEFINITIONS

SEC. 2. The following words, terms and phrases when used in this act have the meaning ascribed to them in this section, except where the context clearly indicates a different meaning:

(a) “**Person**” includes any individual, firm, copartnership, joint adventure, association, social club, fraternal organization, corporation, estate, trust, business trust, receiver, syndicate, this State, any county, city and county, municipality, district or other political subdivision thereof, or any other group or combination acting as a unit, and the plural as well as the singular number.

(b) “**Sale**” means any transfer of title or possession, or both, exchange, barter, lease or rental, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property, for a consideration, or any withdrawal, except a withdrawal pursuant to a transaction in foreign or interstate commerce, of tangible personal property from the place at which such property is located for delivery to a point in this State for the purpose of the transfer of title or possession, or both, exchange, barter, lease or rental, conditional or otherwise, in any manner or by any means whatsoever, of such tangible personal property for a consideration, and includes the

producing, fabricating, processing, printing or imprinting of tangible personal property for consumers who furnish either directly or indirectly the materials used in such producing, fabricating, processing, printing or imprinting, the furnishing and distributing of tangible personal property for a consideration by social clubs and fraternal organizations to their members or others, and the furnishing, preparing or serving for a consideration of food, meals or drinks. A transaction whereby the possession of property is transferred but the seller retains the title as security for the payment of the price shall be deemed a sale. A transfer for a consideration of the title or possession of tangible personal property which has been produced, fabricated or printed to the special order of the customer, or of any publication, shall likewise be deemed a sale.

(c) A **“retail sale”** or **“sale at retail”** means a sale to a consumer or to any person for any purpose other than for resale in the regular course of business in the form of tangible personal property, except that the expressions “transfer of possession,” “lease,” and “rental” as used in subdivision (b) of this section shall mean and include only such transactions as the board, upon investigation, finds to be in lieu of sales as defined in subdivision (b) of this section without the words “lease or rental.”

The delivery in this State of tangible personal property by an owner or former owner thereof or by a factor if such delivery is to a consumer pursuant to a retail sale made by a retailer not engaged in business in this State, is a retail sale in this State by the person making such delivery and such person shall include the retail selling price of such property in his gross receipts.

(d) **“Business”** includes any activity engaged in by any person or caused to be engaged in by him with the object of gain, benefit or advantage, either direct or indirect.

(e) **“Seller”** includes every person engaged in the business of selling tangible personal property the gross receipts from the retail sale of which are required to be included in the measure of the tax imposed hereunder.

“Retailer” includes every person engaged in the business of making sales at retail or in the business of making retail sales at auction of tangible personal property owned by such person or others; except that public or private schools, school districts, student organizations and parent-teacher associations serving meals exclusively to students and teachers, and employers or employee organizations serving meals exclusively to employees shall not be regarded as retailers of the meals served by them. When in the opinion of the board it is necessary for the efficient administration of this act to regard any salesmen, representatives, peddlers or canvassers as the agents of the dealers, distributors, supervisors or employers under whom they operate or from whom they obtain the tangible personal property sold by them, irrespective of whether they are making sales on their own behalf or on behalf of such dealers, distributors, supervisors or employers the board may so regard them and may regard

the dealers, distributors, supervisors or employers as retailers for purposes of this act.

(f) "**Gross receipts**" means the total amount of the sale or lease or rental price, as the case may be, of the retail sales of retailers, including any services that are a part of such sales, valued in money, whether received in money or otherwise, including all receipts, cash, credits and property of any kind or nature, and also any amount for which credit is allowed by the seller to the purchaser, without any deduction therefrom on account of the cost of the property sold, except that in accordance with such rules and regulations as the board may prescribe, a deduction may be taken if the retailer has purchased property for some other purpose than resale, has reimbursed his vendor for tax which the vendor must pay to the State, or has paid the use tax with respect to such property, and has resold the property prior to making any use of such property other than retention, demonstration, or display while holding it for sale in the regular course of business, and without any deduction on account of the cost of the materials used, labor or service cost, interest paid, losses or any other expense whatsoever; provided, however, that cash discounts allowed and taken on sales shall not be included, and "gross receipts" shall not include the sale price of property returned by customers upon rescission of the contract of sale, when the full sale price thereof is refunded either in cash or by credit, nor shall "gross receipts" include the price received for labor or services used in installing or applying the property sold.

For the purpose of this act the total amount of the sale price above mentioned shall be deemed to be the amount received exclusive of the tax hereby imposed; provided, that the retailers shall establish to the satisfaction of the board that the tax imposed hereunder had been added to the sale price and not absorbed by the retailer.

(g) "**Board**" means the State Board of Equalization.

(h) "**Tangible personal property**" means personal property which may be seen, weighed, measured, felt, touched, or is in any other manner perceptible to the senses.

(i) "**In this State**" or "**in the State**" means within the exterior limits of the State of California and includes all territory within such limits owned by or ceded to the United States of America. [*Statutes 1941, Chapter 247; operative July 1, 1941.*]

History.—Enacted Stats. 1933, p. 2599. Stats. 1935, p. 1256, added provisions to (a) respecting state and political subdivisions; added provisions to (b) respecting transfer of possession, lease, rental and fabrication; added provisions to (c) defining "transfer of possession," "lease" and "rental"; added provisions to (e) respecting dealers, distributors, etc., as retailers; added provisions to (f) respecting lease or rental price; and added (h) and (i). Stats. 1937, p. 2223, added provisions to (e) respecting sales at auction. Stats. 1939, p. 2170, added to (a) the words "social club, fraternal organization"; added to (b) the references to withdrawals, to producing, processing, printing, or imprinting, to social clubs and fraternal organizations and to special orders, and revised provisions relating to the serving of food, meals, or drinks; added to (c) the words "in the regular course of business" and the entire second paragraph; added to (e) the first paragraph and the reference in the second paragraph to the serving of meals to students, teachers and employees; added to (f) the proviso relating to deduction on account of cost of property; added the words "upon rescission of the contract of sale" and omitted the words "remodeling" and "repairing." Stats. 1941, Chap. 247, added to (b) the words "or of any publication."

TRANSFERS OF PUBLICATIONS

SEC. 2.5. Repealed. [*Statutes 1941, Chapter 247; operative July 1, 1941.*]

History.—Enacted Stats. (First Extra Session) 1940, Chap. 46, providing that "sale" did not include the transfer of any publication by the publisher thereof or subsequent distributors thereof if such publication was regularly issued at average intervals not exceeding one month.

LEVY OF TAX; TAX RATE

SEC. 3. For the privilege of selling tangible personal property at retail a tax is hereby imposed upon retailers at the rate of $2\frac{1}{2}$ per cent of the gross receipts of any such retailer from the sale of all tangible personal property sold at retail in this State on and after August 1, 1933, and to and including June 30, 1935; and at the rate of 3 per cent of the gross receipts of any such retailer from the sale of all tangible personal property sold at retail in this State on and after July 1, 1935. Such tax shall be paid at the time and in the manner hereinafter provided and shall be in addition to any and all other taxes. [*Statutes 1935, p. 1253; operative July 1, 1935.*]

History.—Enacted Stats. 1933, p. 2600. Stats. 1935, p. 1253, increased rate, effective July 1, 1935, to three per cent.

CONTRACTS MADE PRIOR TO EFFECTIVE DATE OF ACT

SEC. 4. Repealed. [*Statutes 1939, p. 2172; operative July 1, 1939.*]

History.—Enacted Stats. 1933, p. 2600, providing, in the case of sales contracts made prior to the effective date of the act, for the addition to the sales price of the amount of tax imposed by this act.

EXEMPTIONS

SEC. 5. There are hereby specifically exempted from the provisions of this act and from the computation of the amount of tax levied, assessed or payable under this act the following:

(a) The gross receipts from sales of tangible personal property which this State is prohibited from taxing under the Constitution or laws of the United States of America or under the Constitution of this State.

(b) The gross receipts from the sales, furnishing, or service of gas, electricity, and water, when delivered to consumers through mains, lines, or pipes.

(c) The gross receipts from the sale of gold bullion or gold concentrates or gold precipitates by the producer or refiner thereof.

(d) The gross receipts from sales of tangible personal property used for the performance of a contract on public works executed prior to the effective date of this act.

(e) The gross receipts from the sale of food products for human consumption. "Food products" as used herein includes cereals and cereal products, milk and milk products, oleomargarine, meat and meat products, fish and fish products, eggs and egg products, vegetables and vegetable products, fruit and fruit products, spices and salt, sugar and sugar products other than candy and confectionery,

coffee and coffee substitutes, tea, cocoa and cocoa products other than candy and confectionery. "Food products" does not include spirituous, malt or vinous liquors, soft drinks, sodas or beverages such as are ordinarily dispensed at bars and soda fountains or in connection therewith, medicines, tonics, and preparations in liquid, powdered, granular, tablet, capsule, lozenge, and pill form sold as dietary supplements or adjuncts, nor does "food products" include meals served on or off the premises of the retailer nor drinks or foods furnished, prepared or served for consumption at tables, chairs or counters or from trays, glasses, dishes or other tableware provided by the retailer.

(f) The gross receipts from sales made prior to July 1, 1939, to the United States or any agency or instrumentality thereof except a corporate agency or a corporate instrumentality. [*Statutes 1939, p. 2172; operative July 1, 1939.*]

History.—Enacted Stats. 1933, p. 2601. Stats. 1935, p. 1253, added (e). Stats. 1939, p. 2172, added to (e) the reference to medicines, tonics, etc., revised provision referring to meals, drinks, and foods, and added (f).

EXEMPTION OF SALES TO THE UNITED STATES

SEC. 5.1. There are hereby specifically exempted from the provisions of this act and from the computation of the amount of taxes levied, assessed or payable hereunder the gross receipts from the sale of any tangible personal property to the United States or any agency or instrumentality thereof except a corporate agency or a corporate instrumentality. [*Statutes 1939, p. 1890; in effect June 12, 1939.*]

History.—Added by Stats. 1939, p. 1890.

EXEMPTION OF PUBLICATIONS

SEC. 5.2. There are hereby specifically exempted from the provisions of this act and from the computation of the amount of tax, levied, assessed, or payable under this act, the gross receipts from the sale of tangible personal property which becomes an ingredient or component part of any publication regularly issued at average intervals not exceeding one month and the gross receipts from the sale of any such publication. [*Statutes 1941, Chapter 247; operative July 1, 1941.*]

History.—Enacted Stats. 1941, Chap. 247.

SALES TO UNITED STATES CONTRACTORS

SEC. 5.3. Notwithstanding any other provision of law the tax imposed under this act shall apply to the gross receipts from the sale of any tangible personal property to contractors purchasing such property either as the agents of the United States or for their own account and subsequent resale to the United States for use in the performance of contracts with the United States for the construction of improvements on or to real property. [*Statutes 1941, Chapter 681; in effect June 11, 1941.*]

History.—Enacted Stats. 1941, Chap. 681.

EXEMPTION OF VESSELS

SEC. 5.7. There are hereby specifically exempted from the provisions of this act and from the computation of the amount of tax levied, assessed or payable under this act the gross receipt from sales by builders thereof of vessels of more than 1,000 tons burden. [*Statutes 1937, p. 1326; in effect August 27, 1937.*]

History.—Added by Stats. 1937, p. 1326.

EXEMPTION OF AIRCRAFT SALES TO THE UNITED STATES

SEC. 5.13. There are hereby specifically exempted from the provisions of this act and from the computation of the amount of tax levied, assessed, or payable under this act, the gross receipts from sales of aircraft and parts therefor made to the United States Government for purposes of National defense. [*Statutes 1939, p. 1224; in effect May 3, 1939.*]

History.—Added by Stats. 1939, p. 1224.

EXEMPTION OF SILVER BULLION

SEC. 5.14. There are hereby specifically exempted from the provisions of this act, and from the computation of the amount of tax levied, assessed, or payable under this act, the gross receipts from the sales of silver bullion by the producer or refiner thereof. [*Statutes 1939, p. 1906; in effect June 12, 1939.*]

History.—Added by Stats. 1939, p. 1906.

EXEMPTION OF LIVE STOCK AND POULTRY

SEC. 5.18. There are hereby specifically exempted from the computation of the amount of tax levied, assessed or payable under this act, the gross receipts from sales of live stock and poultry of a kind the products of which ordinarily constitute food for human consumption. [*Statutes (First Extra Session) 1940, Chapter 50; in effect June 4, 1940.*]

History.—Added by Stats. (First Extra Session) 1940, Chap. 50.

EXEMPTION OF MOTOR VEHICLE FUEL

SEC. 6. There is hereby specifically exempted from the provisions of this act and from the computation of the amount of tax levied, assessed or payable under this act, the gross receipts received from sales or distributions of motor vehicle fuel in this State subject to the tax imposed thereon under the provisions of the "Motor Vehicle Fuel License Tax Act," and not subject to refund.

The tax by this act imposed upon those sales of motor vehicle fuel which are subject to tax and refund under the "Motor Vehicle Fuel License Act" shall be collected by the State Controller by way of deduction from refunds otherwise allowable under said act. The amount of such deductions, he shall transfer from the Motor Vehicle Fuel Fund to the Retail Sales Tax Fund.

This section is hereby declared to be separable and distinct from all other portions of this act, and shall not be deemed a consideration

or inducement for the enactment of the whole or any portion of this act. If this section be for any reason declared invalid, the remainder of this act shall remain in full force and effect and shall be as completely operative as though this section had not been included therein. [*Original section; Statutes 1933, p. 2601.*]

REFUNDS TO GOVERNMENTAL AGENCIES

SEC. 7. Repealed. [*Statutes 1935, p. 1253; operative July 1, 1935.*]

History.—Enacted Stats. 1933, p. 2601, providing for refund to governmental agencies of tax paid upon sales to the governmental agencies of food stuffs used for free distribution to the poor and needy.

ADVERTISING BY RETAILERS CONCERNING ABSORPTION OF TAX

SEC. 8. It shall be unlawful for any retailer to advertise or hold out or state to the public or to any customer, directly or indirectly, that the tax or any part thereof imposed by this act will be assumed or absorbed by the retailer or that it will not be added to the selling price of the property sold, or if added that it or any part thereof will be refunded. Any person violating any of the provisions of this section shall be guilty of a misdemeanor. [*Original section; Statutes 1933, p. 2602.*]

COLLECTION OF TAX BY RETAILER FROM CONSUMER

SEC. 8½. The tax hereby imposed shall be collected by the retailer from the consumer in so far as the same can be done. This section is hereby declared to be separable and distinct from all other portions of this act, and shall not be deemed a consideration or inducement for the enactment of the whole or any portion of this act. If this section be for any reason declared invalid, the remainder of this act shall remain in full force and effect and shall be as completely operative as though this section had not been included herein. [*Original section; Statutes 1933, p. 2602.*]

QUARTERLY GROSS RECEIPTS RETURN; PAYMENT OF TAX; REVENUE STAMPS

SEC. 9. The tax levied hereunder shall be a direct obligation of the retailer and shall be due and payable quarterly on or before the fifteenth day of the month next succeeding each quarterly period, the first of such quarterly periods being the period commencing with August 1, 1933, and ending on the thirtieth day of September, 1933. Each seller shall on or before the fifteenth day of the month following the close of the first quarterly period as above defined, and on or before the fifteenth day of the month following each subsequent quarterly period of three months, make out a return for the preceding quarterly period in such form as may be prescribed by the board showing the gross receipts of the seller, the amount of the tax for the period covered by such return and such information as the board may deem necessary for the proper administration of this act. The seller shall deliver the return together with a remittance of the amount of

the tax due to the office of the board. The board, if it deems it necessary in order to insure the payment or facilitate the collection of the tax imposed by this act, may require returns and payment of the tax to be made for quarterly periods other than calendar quarters, depending upon the location of the principal place of business of the seller, or for other than quarterly periods. Returns shall be signed by the seller or his duly authorized agent but need not be verified by oath.

Gross receipts from rentals or leases of tangible personal property shall be reported and the tax paid with respect thereto in accordance with such rules and regulations as the board may prescribe.

The board, if it deems it necessary to insure the collection of the tax imposed by this act, may provide by rule and regulation for the collection of said tax by the affixing and canceling of revenue stamps and may prescribe the form and method of such affixing and canceling.

The board may by regulation provide that the amount collected by the retailer from the consumer, in reimbursement of taxes imposed by this act, shall be displayed separately from the list, advertised in the premises, marked or other price on the sales check or other proof of sale. [*Statutes 1941, Chapter 247; operative July 1, 1941.*]

History.—Enacted Stats. 1933 p. 2602. Stats. 1935, p. 1258, omitted provisions authorizing the granting of an extension of time for the payment of tax on credit sales and added paragraph respecting reporting tax on receipts from leases and rentals. Stats. 1939, p. 2173, substituted "seller" for "retailer" in provisions relating to the filing of returns. Stats. 1941, Chap. 247, added provisions for returns for quarterly periods other than calendar quarters.

DELINQUENCY PENALTY; INTEREST

SEC. 9½. Any person failing to pay any tax, except taxes determined by the board under the provisions of Sections 17 and 18 hereof, within the time required by this act shall pay in addition to the tax a penalty of 10 per cent of the amount thereof, plus interest at the rate of one-half of 1 per cent a month, or fraction thereof, from the date at which the tax became due and payable until the date of payment. [*Statutes 1935, p. 1258; operative July 1, 1935.*]

History.—Added by Stats. 1935, p. 1258.

EXTENSION OF TIME FOR FILING RETURNS

SEC. 10. The board for good cause may extend for not to exceed one month the time for making any return or paying any tax required under the provisions of this act.

Any person to whom such extension is granted and who pays the tax within the period for which the extension is granted shall pay, in addition to the tax, interest at the rate of 6 per cent per annum from the date the tax would have been due without such extension to the date of payment. [*Statutes 1939, p. 2174; operative July 1, 1939.*]

History.—Enacted Stats. 1933, p. 2603. Stats. 1939, p. 2174, changed "30 days" to "one month"; added to first paragraph the words "or paying any tax" and added the entire second paragraph.

SECURITY FOR PAYMENT OF TAX

SEC. 11. The board, whenever it deems it necessary to insure compliance with the provisions of this act, may require any person subject to the tax imposed hereunder to deposit with it such security as the

board may determine. The amount of the security shall be fixed by the board but shall not be greater than twice the person's estimated average tax for the period for which he files returns, determined in such manner as the board deems proper, or ten thousand dollars (\$10,000), whichever amount is the lesser. The amount of the security may be increased or decreased by the board subject to the limitations herein provided. The security may be sold by the board at public sale if it becomes necessary so to do in order to recover any tax, interest or penalty due. Notice of such sale may be served upon the person who deposited such securities personally or by mail; if by mail, service shall be made in the manner prescribed by Section 1013 of the Code of Civil Procedure and addressed to the person at his address as the same appears in the records of the board. Upon any such sale, the surplus, if any, above the amounts due under this act shall be returned to the person who deposited the security. [*Statutes 1941, Chapter 247; operative July 1, 1941.*]

History.—Enacted Stats. 1933, p. 2603. Stats. 1941, Chap. 247, added second and third sentences and reworded fourth sentence.

PERMITS

SEC. 12. Thirty days after the effective date of this act, it shall be unlawful for any person to engage in or transact business as a seller within this State, unless a permit or permits shall have been issued to him as hereinafter prescribed. Every person desiring to engage in or conduct business as a seller within this State shall file with the board an application for a permit or permits. Every application for such a permit shall be made upon a form prescribed by the board and shall set forth the name under which the applicant transacts or intends to transact business, the location of his place or places of business, and such other information as the board may require. The application shall be signed by the owner if a natural person; in the case of an association or partnership, by a member or partner thereof; in the case of a corporation, by an executive officer thereof or some person specifically authorized by the corporation to sign the application, to which shall be attached the written evidence of his authority. Any person who engages in business as a seller in this State without a permit or permits or after a permit has been suspended, and the officers of any corporation which shall so sell, shall be guilty of a misdemeanor. [*Statutes 1939, p. 2174; operative July 1, 1939.*]

History.—Enacted Stats. 1933, p. 2603. Stats. 1939, p. 2174, substituted "seller" for "retailer" and reworded last sentence.

FEE FOR PERMIT

SEC. 13. At the time of making such application, the applicant shall pay to the board a permit fee of one dollar (\$1) for each permit, and the applicant must have a permit for each place of business. [*Original section; Statutes 1933, p. 2604.*]

ISSUANCE AND DISPLAY OF PERMIT

SEC. 14. After compliance with the provisions of Sections 11, 12 and 13 hereof by the applicant, the board shall grant and issue to each applicant a permit for each place of business within the State. A per-

mit is not assignable and shall be valid only for the person in whose name it is issued and for the transaction of business at the place designated therein. It shall at all times be conspicuously displayed at the place for which issued. [*Statutes 1939, p. 2175; operative July 1, 1939.*]

History.—Enacted Stats. 1933, p. 2604. Stats. 1939, p. 2175, reworded first sentence.

RENEWAL OF PERMIT

SEC. 15. Permits issued under the provisions of this act prior to April 1, 1935, shall expire on July 31, 1935, and must be renewed through filing an application for renewal on forms prescribed by the board. For each such renewal a fee of one dollar (\$1) must be paid at the time of filing the application therefor. If any retailer shall fail to apply for renewal of his permit or permits as herein required prior to August 1, 1935, a fee of one dollar and fifty cents (\$1.50) must be paid for the renewal of each permit.

The board shall charge a fee of one dollar (\$1) for the renewal or issuance of a permit to a seller whose permit has been previously suspended or revoked. [*Statutes 1939, p. 2175; operative July 1, 1939.*]

History.—Enacted Stats. 1933, p. 2604, providing permits valid without further payment of fee until suspended or revoked by board. Stats. 1935, p. 1259, omitted these provisions and added provisions requiring renewal of permits. Stats. 1939, p. 2175, substituted "seller" for "retailer" in second paragraph.

REVOCATION OF PERMIT

SEC. 16. Whenever any person has failed to comply with any of the provisions of this act or any rules or regulations of the board prescribed and adopted under this act, the board upon hearing, after giving to such person 10 days notice in writing specifying the time and place of such hearing and requiring him to show cause why his permit or permits should not be revoked, may revoke or suspend any one or more of the permits held by such person. Such notice may be served personally or by mail in the same manner as prescribed for service of notice by the provisions of Section 17 hereof. A new permit shall not be issued after the revocation of a permit unless it appears to the satisfaction of the board that the former holder of the permit will comply with such provisions and regulations. [*Statutes 1939, p. 2175; operative July 1, 1939.*]

History.—Enacted Stats. 1933, p. 2604. Stats. 1939, p. 2175, reworded first sentence and added last two sentences.

PRESUMPTION THAT GROSS RECEIPTS ARE TAXABLE; ADDITIONAL ASSESSMENTS

SEC. 17. The burden of proving that a sale of tangible personal property is not a sale at retail shall be upon the person who makes it, unless such person takes from the purchaser a certificate to the effect that the property is purchased for resale. Such certificate relieves the seller from such burden only if taken in good faith from a person engaged in the business of selling tangible personal property and holding the permit provided for in Section 12 of this act and who, at the time of purchasing the tangible personal property, intends to

sell it in the regular course of business or is unable to ascertain at the time of purchase whether such property will be sold or will be used for some other purpose. Such certificate shall be signed by and bear the name and address of the purchaser, shall indicate the number of the permit issued to such purchaser under this act, and shall indicate the general character of the tangible personal property sold by such purchaser in the regular course of business. Such certificate shall be substantially in such form as the board may prescribe.

If a purchaser who gives such a certificate makes any use of such property other than retention, demonstration, or display while holding it for sale in the regular course of business, such use shall be deemed a retail sale by such purchaser as of the time such property is first used by him and the cost of such property to him shall be deemed the gross receipts from such retail sale. If the sole use of such property other than retention, demonstration or display in the regular course of business is the rental of the property while holding it for sale, the purchaser may elect to include in his gross receipts the amount of the rental charged rather than the cost of the property to him.

For the purpose of the proper administration of this act and to prevent evasion of the tax hereby imposed it shall be presumed that all gross receipts are subject to the tax hereby imposed until the contrary is established.

If the board is not satisfied with the return or returns of tax made by any retailer, it is hereby authorized and empowered to make one or more additional assessments of tax due from such retailer based upon the facts contained in the return or returns, or upon any information within its possession or that shall come into its possession. One or more additional assessments may be made of the amount of tax due for one or for more than one period. The amount of tax so assessed shall bear interest at the rate of one-half of 1 per cent per month, or fraction thereof, from the fifteenth day after the close of the quarterly period for which the amount of such tax or any portion thereof should have been returned until the date of payment. In making an assessment hereunder the board may offset overpayments for a period or periods, together with interest on such overpayments, against underpayments for another period or periods, against penalties, and against the interest on such underpayments. Such interest on underpayments and overpayments shall be computed in the manner set forth in Sections 9½ and 23 hereof. If any part of the deficiency for which the additional assessment is imposed is due to negligence or intentional disregard of the act or authorized rules and regulations, a penalty of 10 per cent of the amount of the additional assessment shall be added thereto. If any part of the deficiency for which the additional assessment is imposed is due to fraud or an intent to evade the tax, a penalty of 25 per cent of the amount of the additional assessment shall be added thereto. The board shall give to the retailer written notice of such additional assessment. Such notice may be served upon the retailer personally or by mail; if by mail, service shall be made in the manner prescribed by Section 1013 of the Code of Civil Procedure and addressed to the retailer at his address as the same appears

in the records of the board. [*Statutes 1941, Chapter 247; operative July 1, 1941.*]

History.—Enacted Stats. 1933, p. 2604. Stats. 1935, p. 1259, omitted requirement that notice of assessment state time and place for hearing on petition for reassessment, and added provisions respecting interest and penalties. Stats. 1937, p. 2224, clarified provisions respecting interest. Stats. 1939, p. 2175, reworded first sentence, added the first paragraph except the first sentence thereof, added the entire second paragraph, added "or returns" in third paragraph and added the third, fifth, and sixth sentences to the third paragraph and reworded fourth sentence of third paragraph. Stats. 1941, Chap. 247, reworded fourth paragraph for clarification.

ASSESSMENT IF NO RETURN MADE

SEC. 18. If a retailer fails to make a return as required by this act, the board shall make an estimate based upon any information in its possession or that may come into its possession, of the amount of the gross receipts of the delinquent for the period or periods in respect to which he failed to make a return, and upon the basis of said estimated amount compute and assess the tax payable by the delinquent, adding to the sum thus arrived at a penalty equal to 10 per cent thereof. One or more assessments may be made of the amount of tax due for one or for more than one period. The amount of tax so assessed shall bear interest at the rate of one-half of 1 per cent per month, or fraction thereof, from the fifteenth day after the close of the quarterly period for which the amount of such tax or any portion thereof should have been returned until the date of payment. In making an assessment hereunder the board may offset overpayments for a period or periods together with interest on such overpayments against underpayments for another period or periods, against penalties, and against the interest on such underpayments. Such interest on underpayments and overpayments shall be computed in the manner set forth in Sections 9½ and 23 hereof.

If the failure of a retailer to file a return as required by this act was due to fraud or an intent to evade the tax, there shall be added to the tax a penalty equal to 25 per cent thereof in addition to the 10 per cent penalty for failure to file returns.

Promptly thereafter the board shall give to the delinquent written notice of such estimate, tax and penalty, the notice to be served personally or by mail in the same manner as prescribed for service of notice by the provisions of Section 17 hereof. But the delinquent shall have the right to petition for reassessment of any such tax found, determined and declared by the board pursuant to and in accordance with the provisions of this section. [*Statutes 1941, Chapter 247; operative July 1, 1941.*]

History.—Enacted Stats. 1933, p. 2605. Stats. 1935, p. 1260, omitted requirement that notice of assessment state time and place for hearing on petition for reassessment, and added provisions respecting interest and fraud penalty. Stats. 1939, p. 2177, added to first paragraph provisions specifically authorizing assessments of taxes due for more than one period and the offsetting of overpayments against underpayments, and reworded provisions relating to interest. Stats. 1941, Chap. 247, substituted "fails" for "neglects or refuses," substituted "failure" for "neglect or refusal," substituted "for failure to file returns" for "as above provided," and reworded second sentence for clarification.

JEOPARDY ASSESSMENTS

SEC. 19. If the board believes that the collection of any tax or assessment imposed by or under this act will be jeopardized by delay, it shall thereupon make an assessment of such tax, noting that fact.

upon the assessment levied hereunder and the amount of such assessment shall be immediately due and payable. If the amount of the tax, interest and penalty specified in the jeopardy assessment is not paid within 10 days after the service upon the retailer of notice of the assessment, such assessment becomes final at the expiration of such 10 days, unless a petition for reassessment is filed within such 10 days, and the delinquency penalty and interest provided in Section 9½ hereof shall attach to the amount of the tax specified therein.

The retailer against whom a jeopardy assessment is levied hereunder may petition for the reassessment thereof pursuant to Section 20 hereof; provided, however, that such petition for reassessment must be filed with the board within 10 days after the service upon the retailer of notice of the assessment; and provided further, that the retailer must within said 10-day period deposit with the board such security as it may deem necessary to insure compliance with the provisions of this act. Such security may be sold by the board in the manner prescribed by Section 11 hereof. [*Statutes 1937, p. 2225; operative July 1, 1937.*]

History.—Enacted Stats. 1933, p. 2605, providing taxes assessed under Sections 17 and 18 due and payable fifteen days after service of notice of assessment of the tax. The original section was repealed and the jeopardy assessment provisions added by Stats. 1935, p. 1260. Stats. 1937, p. 2225, added provisions respecting finality of assessment and petition for reassessment.

PETITION FOR REASSESSMENT; HEARING; DUE DATE OF ASSESSMENTS; DELINQUENCY PENALTY

SEC. 20. Any retailer against whom an assessment is made by the board under the provisions of Section 17 or 18 hereof or any person directly interested may petition for a reassessment thereof within 30 days after service upon the retailer of notice thereof. If a petition for reassessment is not filed within said 30-day period the amount of the assessment becomes final at the expiration thereof.

If a petition for reassessment is filed within said 30-day period the board shall reconsider the assessment, and if the retailer has so requested in his petition, shall grant said retailer an oral hearing and shall give the retailer 10 days' notice of the time and place thereof. The board shall have power to continue the hearing from time to time as may be necessary.

The board may decrease or increase the amount of the assessment. The amount of the assessment may be increased, however, only if a claim for such increase is asserted by the board at or before the hearing.

The order or decision of the board upon a petition for reassessment shall become final 30 days after service upon the retailer of notice thereof.

All assessments made by the board under the provisions of Section 17 or 18 hereof shall become due and payable at the time they become final and if not paid when due and payable there shall be added thereto a penalty of 10 per cent of the amount of the tax.

Any notice required by this section shall be served personally or by mail in the same manner as prescribed for service of notice

by the provisions of Section 17 hereof. [*Statutes 1941, Chapter 247; operative July 1, 1941.*]

History.—Enacted Stats. 1933, p. 2605. Stats. 1935, p. 1260, added provisions respecting finality of assessment, notice of time and place of hearing on petition for reassessment, due date of assessment and penalty for delinquent payment of assessment. Stats. 1937, p. 2226, substituted 30 for 15 day period for finality of assessment and within which to petition for reassessment or pay the assessment and 30 for 60 day period for finality of assessment and within which to pay the assessment following the order of the board upon a petition for reassessment. Stats. 1939, p. 2177, added third paragraph. Stats. 1941, Chap. 247, added the words "or any person directly interested."

LIMITATION OF TIME FOR MAKING ADDITIONAL ASSESSMENTS

SEC. 21. Except in case of fraud, intent to evade the tax, failure to make a return, or claim for additional tax pursuant to Section 20 hereof, and except in case of additional tax proposed to be assessed with respect to sales of property for the storage, use or other consumption of which notice of a determination of an additional amount has heretofore been given, or is hereafter given, pursuant to Sections 9, 10, 11 and 15 of the Use Tax Act of 1935, every notice of additional tax proposed to be assessed hereunder shall be mailed to the retailer within three years after the fifteenth day of the calendar month following the quarterly period for which the tax is proposed to be assessed or within three years after the return is filed, whichever period expires the later. [*Statutes 1941, Chapter 247; operative July 1, 1941.*]

History.—Enacted Stats. 1933, p. 2606. Stats. 1935, p. 1261, extended limitation period from two to three years. Stats. 1939, p. 2178, added reference to claim for additional tax and changed provision relating to commencement of limitation period. Stats. (First Extra Session) 1940, Chap. 32, added the provisions relating to use tax determinations. Stats. 1941, Chap. 247, substituted "fraud, intent to evade the tax, failure" for "a fraudulent return or neglect or refusal."

INTEREST ON DELINQUENT TAXES

SEC. 22. All taxes not paid to the board by the retailer on the date when the same become due and payable shall bear interest in the rate of one-half of 1 per cent per month, or fraction thereof, from and after such date until paid. [*Statutes 1935, p. 1261; operative July 1, 1935.*]

History.—Enacted Stats. 1933, p. 2606. Stats. 1935, p. 1261, changed rate of interest from 12 per cent per annum to one-half of 1 per cent per month, or fraction thereof.

OVERPAYMENTS; REFUNDS

SEC. 23. If the board determines that any amount, penalty or interest has been paid more than once, or has been erroneously or illegally collected, the board shall set forth that fact in the records of the board and shall certify to the State Board of Control the amount collected in excess of what was legally due, and the person from whom it was collected, or by whom paid, and if approved by the State Board of Control the excess amount collected or paid shall be credited on any taxes then due from the retailer under this act or under the California Use Tax Act of 1935 and the balance shall be refunded to the person, or his successors, administrators, or executors. No refund shall be allowed unless a claim therefor is filed with the State Board of Equalization within three years from the fifteenth day after the close of the

quarterly period for which the overpayment was made or, with respect to assessments made under the provisions of Sections 17 and 18 hereof, within six months after such assessments became final, or within 60 days from the date of overpayment, whichever period expires the later. No credit shall be allowed after the expiration of the period specified for filing claims for refund unless a claim for credit is filed with the board within such period.

Every such claim must be in writing and must state the specific grounds upon which the claim is founded.

Failure to file such claim within the time prescribed in this section shall constitute waiver of any and all demands against this State on account of overpayments hereunder. Within 30 days after disallowing any such claim in whole or in part, the board shall serve notice of such action on the claimant, such service to be made as provided by Section 17 hereof.

Interest shall be computed, allowed and paid upon any overpayment of any tax, at the rate of one-half of 1 per centum per month as follows:

(1) From the fifteenth day of the calendar month following the quarterly period for which the overpayment was made but no refund or credit shall be made of any interest imposed upon the claimant with respect to the tax being refunded or credited.

(2) In the case of a refund, to the fifteenth day of the calendar month following the date upon which the claimant is notified by the board that a claim may be filed or that the claim has been certified to the State Board of Control, whichever date is the earlier.

(3) In the case of a credit, to the same date that interest is computed on the tax against which the credit is applied.

Any refund or any portion thereof which is erroneously made and any credit or any portion thereof which is erroneously allowed, may be recovered in an action brought by the Controller of the State in a court of competent jurisdiction in the County of Sacramento, in the name of the people of the State of California and such action shall be tried in the County of Sacramento unless the court with the consent of the Attorney General, orders a change of place of trial. The Attorney General must prosecute such action, and the provisions of the Code of Civil Procedure relating to service of summons, pleadings, proofs, trials and appeals are applicable to the proceedings herein provided for.

In the event that a tax has been illegally levied, the board shall certify such fact to the State Board of Control and said board shall authorize the cancellation of the tax upon the records of the board.

If the board determines that any overpayment of tax has been intentionally made or made by reason of carelessness, it shall not allow any interest thereon. [*Statutes 1941, Chapter 247; operative July 1, 1941.*]

History.—Enacted Stats. 1933, p. 2606. Stats. 1935, p. 1261, omitted provisions respecting filing of verified claims for refund in duplicate within six months from the date of overpayment. Stats. 1937, p. 2226, added provisions respecting filing of claim for refund within three years from the date of overpayment and provisions respecting interest on overpayments. Stats. 1939, p. 2178, revised first paragraph to authorize the application of overpayments against taxes due under the Use Tax Act, to compute the limitation period from the fifteenth day after the quarterly period instead of from the date of overpayment, and to extend the limitation period on refunds or credits with respect to assessments to six months after the assess-

ments become final; added third and last paragraphs and revised provisions relating to the computation and allowance of interest. Stats. 1941, Chap. 247, reworded the first paragraph to provide that refunds shall be to the "person" making the overpayment and to permit credits to be allowed prior to the expiration of the specified three-year period without the filing of a claim for credit, and added the words "or within 60 days from the date of overpayment."

FRAUD OR EVASION OF TAX

SEC. 24. If fraud or evasion on the part of a retailer is discovered by the board, it shall determine the amount by which the State has been defrauded, shall add to the amount so determined a penalty equal to 25 per cent thereof, and shall assess the same against the retailer. All such assessments shall bear interest at the rate of one-half of 1 per cent per month or fraction thereof, from the fifteenth day after the close of the period or periods, as the case may be, for which the amount should have been paid. The amount so assessed shall be immediately due and payable and if not paid within 10 days after the service upon the retailer of notice of the assessment the delinquency penalty and interest provided in Section 9½ hereof shall attach to the amount of the tax specified therein. [*Statutes 1935, p. 1262; operative July 1, 1935.*]

History.—Enacted Stats. 1933, p. 2606. Stats. 1935, p. 1262, added provision respecting interest and delinquency penalty.

REPORT OF BOARD TO CONTROLLER

SEC. 25. The board shall report to the Controller the amount of collections under this act and he shall keep a record thereof. [*Statutes 1937, p. 2227; operative July 1, 1937.*]

History.—Enacted Stats. 1933, p. 2607. Stats. 1937, p. 2227, omitted provisions that board report all assessments and substituted therefor that board report amount of collections.

COLLECTION PROCEDURE; LIEN OF TAX

SEC. 26. In any case in which any tax, interest or penalty imposed under this act is not paid when due the board may within three years after the tax is due file in the office of the county clerk of Sacramento County, or any other county, a certificate specifying the amount of the tax, interest and penalty due, the name and address as it appears on the records of the board of the retailer liable for the same, that the board has complied with all the provisions of this act in relation to the computation and levy of the tax and a request that judgment be entered against the retailer in the amount of the tax, interest and penalty set forth in the certificate. The county clerk immediately upon the filing of such certificate shall enter a judgment for the people of the State of California against the retailer in the amount of the tax, interest and penalty set forth in the certificate. The judgment may be filed by the county clerk in a loose-leaf book entitled "Special Judgments for State Retail Sales or Use Tax."

An abstract of such judgment or a copy thereof may be recorded with the county recorder of any county and from the time of such recording, the amount of the taxes, interest and penalty therein set forth shall constitute a lien upon all the real property of the retailer in such county, owned by him or which he may afterwards and before the lien expires acquire, which lien shall have the force, effect and

priority of a judgment lien and shall continue for five years from the date of the judgment so entered by the county clerk unless sooner released or otherwise discharged. The lien may, within five years from the date of the judgment or within five years from the date of the last extension of the lien in the manner herein provided, be extended by filing for record in the office of the county recorder of any county an abstract or copy of the judgment and from the time of such filing the lien shall be extended to the real property in such county for five years unless sooner released or otherwise discharged. Execution shall issue upon such a judgment upon request of the board in the same manner as execution may issue upon other judgments and sales shall be held under such execution as prescribed in the Code of Civil Procedure. In all proceedings under this section the board shall be authorized to act on behalf of the people of the State of California.

In any case in which any tax, interest or penalty imposed under this act is not paid when due the board may within three years after the tax is due file in the office of any county recorder a certificate specifying the amount of the tax, interest and penalty due, the name and address as it appears on the records of the board of the retailer liable for the same, and that the board has complied with all provisions of this act in relation to the computation and levy of the tax. From the time of the filing for record the amount of the tax, interest and penalty therein set forth shall constitute a lien upon all real property of the retailer in such county, owned by him or which he may afterwards and before the lien expires acquire, which lien shall have the force, effect and priority of a judgment lien and shall continue for five years from the time of the filing of the certificate unless sooner released or otherwise discharged. The lien may, within five years from the date of the filing of the certificate or within five years from the date of the last extension of the lien in the manner herein provided, be extended by filing for record a new certificate in the office of the county recorder of any county and from the time of such filing the lien shall be extended to the real property in such county for five years unless sooner released or otherwise discharged.

At any time within three years after the delinquency of any tax, interest, or penalty, or within five years after the filing of the certificate referred to in the third paragraph of this section a warrant may be issued by the board or its duly authorized representative for the collection of any tax, interest or penalty and for the enforcement of any lien, directed to any sheriff, marshal or constable; and shall have the same effect as a writ of execution. It may and shall be levied and sale made pursuant to it in the same manner and with the same effect as a levy of and sale pursuant to a writ of execution. The sheriff, marshal or constable shall receive upon the completion of his services pursuant to a warrant and the board is authorized to pay to him the same fees and commissions and expenses in connection with services pursuant to said warrant as are provided by law for similar services pursuant to a writ of execution; provided, that fees for publication in a newspaper shall be subject to approval by the board rather than by the court; said fees, commissions and expenses shall be an obligation of the retailer and may be collected from the retailer

by virtue of the warrant or in any other manner provided in this act for the collection of a tax.

If any retailer liable for any tax, interest or penalty levied hereunder shall sell out his business or stock of goods or shall quit the business, he shall make a final return and payment within 15 days after the date of selling or quitting business. His successor, successors or assigns, if any, shall withhold sufficient of the purchase price to cover the amount of such taxes, interest or penalties accrued or due and unpaid until such time as the former owner shall produce a receipt from the board showing that they have been paid, or a certificate stating that no taxes, interest or penalties are due. If the purchaser of a business or stock of goods shall fail to withhold the purchase price as above provided, he shall be personally liable for the payment of the taxes, interest and penalties accrued and unpaid on account of the operation of the business by any former owner, owners or assignors to the extent of the purchase price, valued in money. Within 30 days after receiving a written request from the purchaser for a certificate, the board shall either issue the certificate or mail notice to the purchaser at his address as it appears on the records of the board of the amount of the tax, interest, and penalties that must be paid as a condition of issuing the certificate. Failure of the board to mail the notice will release the purchaser from any further obligation to withhold purchase price as above provided.

In the event that any retailer is delinquent in the payment of the tax herein provided for or in the event an assessment has been made against him which remains unpaid, the board may, not later than three years after the payment becomes delinquent give notice thereof by registered mail to all persons having in their possession, or under their control, any credits or other personal property belonging to such retailer, or owing any debts to such retailer at the time of receipt by them of such notice and thereafter any person so notified shall neither transfer nor make any other disposition of such credits, other personal property, or debts until the board shall have consented to a transfer or disposition, or until 20 days shall have elapsed from and after the receipt of such notice. All persons so notified must, within five days after receipt of such notice, advise the board of any and all such credits, other personal property or debts, in their possession, under their control or owing by them, as the case may be.

At any time within three years after any retailer is delinquent in the payment of the tax herein provided for, the board may proceed forthwith to collect the tax due from the retailer in the following manner: The board shall seize any property, real or personal, of the retailer not exempt from execution under the provisions of the Code of Civil Procedure, and thereafter sell at public auction such property so seized, or a sufficient portion thereof, to pay the tax due hereunder, together with any interest or penalties imposed hereby for such delinquency, and any and all costs that may have been incurred on account of such seizure and sale. Notice of such intended sale and the time and place thereof, shall be given to such delinquent retailer in writing at least 10 days before the date set for such sale by inclosing such notice in an envelope addressed to such retailer at his last known residence or place of business in this State, if any, and depositing the same

in the United States mail, postage prepaid, and by publication for at least 10 days before the date set for such sale in a newspaper of general circulation published in the county or city and county in which the property seized is to be sold; provided, that if there be no newspaper of general circulation in such county or city and county, then by the posting of such notice in three public places in such county or city and county 10 days prior to the date set for such sale. The said notice shall contain a description of the property to be sold, together with a statement of the amount of the taxes, interest, penalties and costs, the name of the retailer, and the further statement that unless such taxes, interest and penalties and costs are paid on or before the time fixed in said notice for such sale, said property, or so much thereof as may be necessary, will be sold in accordance with law and said notice.

At any such sale, the property shall be sold by the board in accordance with law and said notice, and the board shall deliver to the purchaser a bill of sale for the personal property, and a deed for any real property so sold, and such bill of sale or deed shall vest the interest or title of the retailer in the purchaser. The unsold portion of any property so seized may be left at the place of sale at the risk of the retailer. If upon any such sale, the moneys so received shall exceed the amount of all taxes, interest, penalties and costs due the State from such retailer, any such excess shall be returned to the retailer, and his receipt therefor obtained; provided, however, that if any person having an interest or lien upon the property has filed with the board prior to any such sale notice of such interest or lien the board shall withhold any such excess pending a determination of the rights of the respective parties thereto by a court of competent jurisdiction. If, for any reason, the receipt of such retailer shall not be available, the board shall deposit such excess moneys with the State Treasurer, as trustee for such owner, subject to the order of such retailer, his heirs, successors or assigns.

It is expressly provided that the foregoing remedies of the State shall be cumulative and that no action taken by the board or Attorney General shall be construed to be an election on the part of the State or any of its officers to pursue any remedy hereunder to the exclusion of any other remedy for which provision is made in this act. [*Statutes 1939, p. 2179; operative July 1, 1939.*]

History.—Enacted Stats. 1933, p. 2607. Stats. 1935, p. 1262, omitted provisions authorizing filing of notice of lien for tax, interest or penalty due in recorder's office and substituted provisions authorizing entry of judgment for tax, interest or penalty due and the issue of execution thereon. Stats. 1939, p. 2179, inserted limitation period in first and sixth paragraphs and added third and fourth paragraphs. Stats. 1941, Chap. 247, substituted "address as it appears on the records of the board" for "last known address" in the first and third paragraphs, added provisions for the renewal of liens in the second and third paragraphs, substituted "the filing for record" for "such recording" in third paragraph, added all the words preceding "a warrant" to the fourth paragraph, added "marshal" and "marshal or constable" to fourth paragraph, clarified the provisions of fifth paragraph relating to the extent of the successor's liability, added the last two sentences to the fifth paragraph, reworded sixth paragraph to permit notice to be given "in the event an assessment has been made . . . which remains unpaid," and eliminated reference to a particular section of the Code of Civil Procedure in the seventh paragraph.

RELEASE AND SUBORDINATION OF LIENS

SEC. 26.3. The board may at any time release all or any portion of the property subject to any lien provided for in this act from such

lien, or subordinate the lien to other liens and encumbrances, if it determines that the taxes, interest and penalties are sufficiently secured by a lien on other property or that the release or subordination of the lien will not endanger or jeopardize the collection of such taxes, interest and penalties. A certificate by the board to the effect that any property has been released from the lien provided for in this act or that such lien has been subordinated to other liens and encumbrances shall be conclusive evidence that the property has been released or that the lien has been subordinated as provided in the certificate. [*Statutes 1939, p. 2182; operative July 1, 1939.*]

History.—Added by Stats. 1939, p. 2182.

PRIORITY OF TAX

SEC. 26½. Whenever any retailer or other person liable for any tax levied hereunder is insolvent, whenever any retailer or other person makes a voluntary assignment of his assets, whenever the estate of a deceased retailer or other person in the hands of executors, administrators, or heirs is insufficient to pay all the debts due from the deceased, or whenever the estate and effects of an absconding, concealed, or absent retailer or other person are levied upon by process of law, the tax, together with interest and penalties attaching thereto, shall be first satisfied; provided, however, that this section shall not be construed to give the State a preference over any recorded lien which attached prior to the date when the tax became a lien.

The preference given to the State by this section shall be subordinate to the preferences given to claims for personal services by Sections 1204 and 1206 of the Code of Civil Procedure. [*Statutes 1941, Chapter 767; in effect September 13, 1941.*]

History.—Added by Stats. 1935, p. 1225. Stats. 1939, p. 2183, added the words "or other person." Stats. 1941, Chap. 767, added the last paragraph.

RECORDS OF SELLERS; ADMINISTRATION OF ACT BY BOARD

SEC. 27. Every seller shall keep such records, receipts, invoices and other pertinent papers in such form as the board may require.

The board or any person authorized in writing by it is hereby authorized to examine the books, papers, records and equipment and to investigate the character of the business of any person selling tangible personal property in order to verify the accuracy of any return made, or if no return was made by such person, to ascertain and assess the tax imposed by this act. The board is hereby charged with the enforcement of the provisions of this act and is hereby authorized and empowered to prescribe, adopt and enforce rules and regulations relating to the administration and enforcement of the provisions of this act in the collection of taxes, penalties and interest imposed by this act, and to that end may appoint such accountants, auditors, investigators and assistants as it may deem necessary to enforce its powers and perform its duties under this act and may designate representatives to conduct hearings, prescribe regulations or perform any other duties imposed by this act or other laws of this State upon the board.

The board may prescribe the extent, if any, to which any ruling or regulation relating to this act shall be applied without retroactive effect. [*Statutes 1939, p. 2183; operative July 1, 1939.*]

History.—Enacted Stats. 1933, p. 2609. Stats. 1935, p. 1264, substituted "person selling tangible personal property" for "retailer." Stats. 1937, p. 2227, added provisions respecting the designation of representatives to perform duties imposed upon the board and provisions respecting the retroactive effective rulings. Stats. 1939, p. 2183, substituted the word "seller" for "retailer" in the first paragraph.

INFORMATION CONFIDENTIAL

SEC. 28. It shall be unlawful for the board, or any person having an administrative duty under this act to divulge or to make known in any manner whatever, the business affairs, operations, or information obtained by an investigation of records and equipment of any retailer or other person visited or examined in the discharge of official duty, or the amount or source of income, profits, losses, expenditures or any particular thereof, set forth or disclosed in any return, or to permit any return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person; provided, however, that the Governor may, by general or special order, authorize examination of such returns by other State officers, by tax officers of another State or the Federal Government if a reciprocal arrangement exists, and any other persons the Governor may so authorize. Successors, receivers, trustees, executors, administrators, assignees, and guarantors, if directly interested, may be given information as to the items included in the measure and amounts of any unpaid tax, interest, and penalties.

Any violations of the provisions of this section shall be a misdemeanor and be punished by a fine not exceeding one thousand dollars (\$1,000), or by imprisonment not exceeding one year, or both, at the discretion of the court. [*Statutes 1941, Chapter 247; operative July 1, 1941.*]

History.—Enacted Stats. 1933, p. 2609. Stats. 1939, p. 2183, added in first paragraph the words "or other person," omitted the words "except as provided by law" at the end of the first clause and added to the second clause the words "by general or special order." Stats. 1941, Chap. 247, added the second sentence to the first paragraph.

DISPOSITION OF PROCEEDS

SEC. 29. All fees, taxes, interest and penalties imposed under this act must be paid to the board in the form of remittances payable to the State Board of Equalization of the State of California, and said board shall transmit such payments to the State Treasurer to be deposited in the State Treasury to the credit of the "Retail Sales Tax Fund." For expenditure by the board in carrying out the provisions of this act for each fiscal year there is hereby appropriated out of the Retail Sales Tax Fund a sum of money which, together with any other appropriations for such purpose shall be equal to 3 per cent of all moneys deposited in said fund during the next preceding fiscal year. All moneys in the Retail Sales Tax Fund, unless otherwise appropriated shall, upon order of the State Controller, be drawn therefrom for the purpose of refunding to the retailers hereunder or be

transferred to the General Fund of the State. [*Statutes 1939, p. 2184; operative July 1, 1939.*]

History.—Enacted Stats. 1933, p. 2609. Stats. 1935, p. 1265, omitted specific appropriations for State Board of Equalization, Controller and State Treasurer, limited appropriation to State Board of Equalization of permit fees to fees paid to and including June 30, 1936, and provided tax remittances should be payable to State Board of Equalization rather than to State Treasurer. Stats. 1937, p. 2228, omitted appropriation of permit fees and added appropriation for the 89th and 90th fiscal years. Stats. 1939, p. 2184, omitted appropriation for 89th and 90th fiscal years and added appropriation for each fiscal year.

SUIT TO ENFORCE PAYMENT

SEC. 30. At any time within three years after the delinquency of any tax, the board may bring an action in a court of competent jurisdiction in the name of the people of the State of California to collect the amount delinquent, together with interest and penalties. The Attorney General must prosecute such action, and the provisions of the Code of Civil Procedure relating to service of summons, pleadings, proofs, trials and appeals are applicable to the proceedings herein provided for. In such action a writ of attachment may issue, and no bond or affidavit previous to the issuing of said attachment is required. In such action a certificate by the board showing the delinquency shall be prima facie evidence of the levy of the tax, of the delinquency of the amount of tax, interest and penalty set forth therein and of compliance by the board with all provisions of this act, in relation to the computation and levy of the tax. [*Statutes 1939, p. 2184; operative July 1, 1939.*]

History.—Enacted Stats. 1933, p. 2610. Stats. 1935, p. 1265, extended limitation period from two to three years. Stats. 1939, p. 2184, added the words "interest and" in first sentence and added the words "of the amount of tax, interest, and penalty set forth therein" in last sentence.

SUIT FOR REFUND

SEC. 31. No injunction or writ of mandate or other legal or equitable process shall issue in any suit, action or proceeding in any court against this State or against any officer thereof to prevent or enjoin the collection under this act of any tax sought to be collected, and no suit or proceeding shall be maintained in any court for the recovery of any amount alleged to have been erroneously or illegally assessed or collected unless a claim for refund or credit has been duly filed as provided in Section 23 hereof.

Within 90 days after the mailing of the notice of the board's action upon such claim, the claimant may bring an action against the board on the grounds set forth in such claim in a court of competent jurisdiction in the County of Sacramento for the recovery of the whole or any part of the amount with respect to which such claim has been disallowed.

If the board fails to mail notice of action on any such claim within six months after the claim is filed the claimant may, prior to mailing notice of action on such claim by the board, consider the claim disallowed and bring an action against the board on the grounds set forth in such claim for the recovery of the whole or any part of the amount claimed as an overpayment. Failure to bring suit or action

within the time specified shall constitute a waiver of any and all demands against this State on account of any alleged overpayments hereunder.

If in any such action judgment is rendered for the plaintiff, the amount of the judgment shall first be credited on any taxes due from the plaintiff under this act or under the California Use Tax Act of 1935, and the balance of the judgment shall be refunded to the plaintiff. In any such judgment, interest shall be allowed at the rate of 6 per cent per annum upon the amount found to have been illegally collected from the date of payment of such amount to the date of allowance of credit on account of such judgment or to a date preceding the date of the refund warrant by not more than 30 days, such date to be determined by the board.

In no case shall any judgment be rendered in favor of the plaintiff in any action brought against the board to recover any tax paid hereunder, when such action is brought by or in the name of an assignee of the retailer paying said tax, or by any person other than the person who has paid such tax. [*Statutes 1939, p. 2184; operative July 1, 1939.*]

History.—Enacted Stats. 1933, p. 2610. Stats. 1939, p. 2184, omitted provision for payment of tax under protest and substituted provision requiring filing of a claim for refund or credit prior to bringing suit, changed limitation period, added first sentence of third paragraph, revised fourth paragraph to authorize credits against taxes due under the Use Tax Act and to authorize allowance of interest upon the "amount" rather than the "tax" found to have been illegally collected, and provided for actions to be brought against the board rather than against treasurer.

PENALTY FOR FAILURE TO MAKE RETURN OR FOR MAKING FALSE OR FRAUDULENT RETURN

SEC. 32. Any retailer failing or refusing to furnish any return hereby required to be made, or failing or refusing to furnish a supplemental return or other data required by the board, or rendering a false or fraudulent return, shall be guilty of a misdemeanor and subject to a fine of not exceeding five hundred dollars (\$500) for each such offense.

Any person required to make, render, sign or verify any report as aforesaid, who makes any false or fraudulent return, with intent to defeat or evade the assessment required by law to be made, shall be guilty of a misdemeanor, and shall for each such offense be fined not less than three hundred dollars (\$300) and not more than five thousand dollars (\$5,000) or be imprisoned not exceeding one year in the county jail or be subject to both said fine and imprisonment in the discretion of the court. [*Original section; Statutes 1933, p. 2611.*]

APPLICABILITY OF RES JUDICATA

SEC. 32.5. In the determination of any case arising under this act, the rule of res judicata shall be applicable only if the liability involved is for the same quarterly period as was involved in another case previously determined. [*Statutes 1939, p. 2185; operative July 1, 1939.*]

History.—Added by Stats. 1939, p. 2185.

PENALTY FOR VIOLATION OF ACT

SEC. 33. Any violation of the provisions of this act, except as otherwise herein provided, shall be a misdemeanor and punishable as such. [*Statutes 1937, p. 2228; operative July 1, 1937.*]

History.—Enacted Stats. 1933, p. 2611, providing for judicial review of orders of the board. Stats. 1935, p. 1265, added provisions requiring petitioner to pay cost of preparation of transcripts of board's proceedings. Stats. 1937, p. 2228, repealed the original section and renumbered section 32½ as section 33.

CONSTITUTIONALITY

SEC. 34. If any section, subsection, clause, sentence or phrase of this act which is reasonably separable from the remaining portions of this act is for any reason held to be unconstitutional, such decision shall not affect the remaining portions of this act. The Legislature hereby declares that it would have passed the remaining portion of this act irrespective of the fact that any such section, subsection, clause, sentence or phrase of this act be declared unconstitutional. [*Original section; Statutes 1933, p. 2611.*]

ACT EFFECTIVE IMMEDIATELY

SEC. 35. This act, inasmuch as it provides for a tax levy for the usual current expenses of the State, shall, under the provisions of Section 1 of Article IV of the Constitution, take effect immediately. [*Original section; Statutes 1933, p. 2611.*]

SUPPLEMENT

An act to add a new section, to be numbered 5.3, to the Retail Sales Tax Act of 1933 and a new section, to be numbered 6384, to the Revenue and Taxation Code, both relating to the taxable status of certain sales to contractors; to defer final assessment and determination of sales and use taxes in certain instances, to define certain terms relating to said taxes, to declare the legislative intent with respect thereto, and providing that this act shall take effect immediately. [Statutes 1941, Chapter 681, in effect June 11, 1941.]

SECTION 1. A new section, to be numbered 5.3, is hereby added to the Retail Sales Tax Act of 1933, to read as follows:

Sec. 5.3. Notwithstanding any other provision of law the tax imposed under this act shall apply to the gross receipts from the sale of any tangible personal property to contractors purchasing such property either as the agents of the United States or for their own account and subsequent resale to the United States for use in the performance of contracts with the United States for the construction of improvements on or to real property.

SEC. 2. A new section, to be numbered 6384, is hereby added to the Revenue and Taxation Code.

6384. Notwithstanding any other provision of law the tax imposed under this part shall apply to the gross receipts from the sale of any tangible personal property to contractors purchasing such property either as the agents of the United States or for their own account and subsequent resale to the United States for use in the performance of contracts with the United States for the construction of improvements on or to real property.

SEC. 3. Except as otherwise provided in this act, if a retailer, or other person authorized so to do, petitions in conformity with the requirements of Section 20 of the Retail Sales Tax Act of 1933, Section 12 of the Use Tax Act of 1935, or Section 6561 of the Revenue and Taxation Code for reassessment or redetermination of a tax computed on gross receipts from sales of, or the sales price of, tangible personal property purchased by contractors for use in the performance of contracts with the United States for construction of National Defense facilities on a cost-plus-a-fixed-fee basis, pending a final decision in a court of last resort that the tax imposed under the Retail Sales Tax Act of 1933, the Use Tax Act of 1935, or the Revenue and Taxation Code, as the case may be, is applicable with respect to transactions of such kind, the State Board of Equalization shall not initiate action to cause the assessment or determination to become final.

SEC. 4. Except as otherwise provided in this act, the State Board of Equalization shall not make a final assessment or determination with respect to a tax which is the subject of a petition for reassessment or redetermination under the conditions described in Section 3 hereof, and which is computed on gross receipts from, or the sales price of, a sale made prior to a decision such as is mentioned in said section or, if made subsequent to such a decision, at a price fixed by a contract which became binding prior to July 1, 1941, if it is established that the person liable for the tax has refrained from seeking reimbursement therefor only because of the insistence of those representing the United States with respect to such transactions and, after a reasonable effort to collect, can not be reimbursed therefor as a part of the sales or purchase price. As used in this section the term "reasonable effort to collect" shall not include nor require the institution of litigation until after such decision, and then only if it shall first have been established in a comparable matter, following a final assessment or determination made by the board pursuant to Section 6 of this act, that the person liable for the tax is entitled to be reimbursed for the amount thereof by his vendee.

SEC. 5. Unless a person otherwise liable for a tax such as is described in Section 3 of this act shall maintain accurate records with respect to all transactions of the type therein described and shall report the transactions to the State Board of Equalization as required by the Retail Sales Tax Act of 1933, the Use Tax Act of 1935, or the Revenue and Taxation Code, as the case may be, said section shall not apply to such person or to any tax assessed against him.

SEC. 6. Nothing contained in this act shall prevent the State Board of Equalization from making such final assessments or determinations of tax with respect to transactions of the type described in Section 3 of this act as it may deem necessary to establish the validity of assessments or determinations arising out of transactions of such kind, as well as to establish the right of the retailer or other person liable for the tax to be reimbursed for the amount thereof by his vendee, nor shall this act affect jeopardy assessments under Section 19 of the Retail Sales Tax Act of 1933, or jeopardy determinations under Section 11 of the Use Tax Act of 1935, or Section 6536 of the Revenue and Taxation Code.

SEC. 7. A taxpayer shall not be liable for interest with respect to any tax assessed or determined under the Retail Sales Tax Act of 1933 and Use Tax Act of 1935 or Revenue and Taxation Code, arising out of transactions described in Section 3 of this act, if such tax is paid within six months after the effective date of the final decision in a court of last resort that the tax imposed under said acts is applicable, as the case may be, with respect to transactions of such kind, or on or before the date on which the assessment or determination becomes final whichever is the later.

SEC. 8. Nothing contained in this act shall be construed as a legislative intent, interpretation, or concession to the effect that the

tax imposed under the Retail Sales Tax Act of 1933, the Use Tax Act of 1935, or Revenue and Taxation Code, as the case may be, is inapplicable with respect to any transaction or situation mentioned herein, and the Legislature hereby declares and reaffirms that the sales tax is not imposed upon any purchaser of tangible personal property in this State, but is for the privilege of engaging in the business of selling such property at retail. The Legislature hereby further declares that in enacting Section 5.1 of the Retail Sales Tax Act of 1933 and Section 6381 of the Revenue and Taxation Code, it did not intend to exempt from the sales tax the gross receipts from sales of tangible personal property used in the performance of contracts with the United States for the construction of improvements on or to real property.

SEC. 9. Notwithstanding any of the provisions of this act, the Retail Sales Tax Act of 1933, the Use Tax Act of 1935 or the Revenue and Taxation Code, a sale of tangible personal property to a contractor or subcontractor for use in the performance of contracts with the United States for the construction of improvements on or to real property is hereby declared to be a retail sale within the meaning of that term as defined in said acts or said code, and, accordingly, the gross receipts from such a sale or the purchase price of property so sold shall be included in the measure of the tax imposed under said acts or said code, or any of them.

SEC. 10. If any section, subsection, clause, sentence or phrase of this act which is reasonably separable from the remaining portions of this act is for any reason held to be unconstitutional, such decision shall not affect the remaining portions of this act. The Legislature hereby declares that it would have passed the remaining portion of this act irrespective of the fact that any such section, subsection, clause, sentence or phrase of this act be declared unconstitutional.

SEC. 11. This act, inasmuch as it provides for a tax levy for the usual current expenses of the State, shall, under the provisions of Section 1 of Article IV of the Constitution, take effect immediately; provided, however, that the provisions hereof adding Section 6384 to the Revenue and Taxation Code shall become operative at the same time as Part 1, Division 2, of the Revenue and Taxation Code, passed by the Legislature at its Fifty-fourth Session.

No. 10021

IN THE

11

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

STATE BOARD OF EQUALIZATION OF THE STATE OF
CALIFORNIA,

Appellant,

vs.

L. BOTELER, Trustee in Bankruptcy of the Estate of
DAVIS STANDARD BREAD COMPANY, a corporation,

Appellee.

BRIEF OF APPELLEE.

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This case, stripped down to essentials, simply resolves itself into two questions:

1. Has the State of California, or any other State in the Union, the right to project itself into the administration of bankrupt estates, a field reserved entirely to Congress, and to require officers of the United States District Court to take out licenses permitting them to convert the bankrupt's assets into cash and then to impose a tax on the proceeds of such judicial sales?
2. Has the United States District Court the power and jurisdiction to protect its own officers from such illegal encroachment upon their duties and prerogatives as is here sought to be inflicted by the State of California?

Under Section 8, Article 1 of the Constitution of the United States, Congress is given the sole and exclusive power to "establish uniform laws on the subject of bankruptcies throughout the United States." Acting under this grant of power Congress enacted the National Bankruptcy Act which defines, among other things, the jurisdiction of the United States District Courts in bankruptcy matters and the rights and duties of a trustee thereunder.

Section 2 of the Bankruptcy Act (11 U. S. C. A., Sec. 11), confers jurisdiction on United States Courts, among other matters, as follows:

Subdv. (15). "Make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this Act; provided however, that an injunction to restrain a court may be issued by the judge only."

Subdivision 21-b of Section 2 expressly provides:

“Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated.”

Section 47-a of the Bankruptcy Act (11 U. S. C. A., Sec. 75-a) prescribes that mandatory duties of the trustee, as follows:

“Trustees shall (1) collect and reduce to money the property of the estates for which they are trustees, under the direction of the court, and close up the estates as expeditiously as is compatible with the best interests of the parties in interest.”

In the case at bar the trustee, in disposing of the assets at private sale, after an attempt had been made to sell them at public auction without a satisfactory bid, was carrying out the plain mandate of Section 47-a of the Bankruptcy Act. Nowhere in Section 47-a is there any requirement that he take out a state license or pay a state sales tax in connection with the judicial sale conducted “under the direction of the court.”

Section 45 of the National Bankruptcy Act (11 U. S. C. A., Section 73-a) prescribes the qualification of receivers and trustees, as follows:

“Receivers and trustees shall be (1) individuals who are competent to perform their duties, and who reside or have an office within the judicial district in which they are appointed, or (2) corporations authorized by their charters or by law to act in such capacity and having an office in the judicial district within which they are appointed.”

Nowhere is there any requirement in Section 45 that a trustee in bankruptcy, an individual, shall be required, at the expense of the bankrupt estate or otherwise, to take out a license from a State authorizing him to or extending to him the "privilege" of performing the duties imposed upon him by the United States Statute under which his office is created.

If the construction of the trustee's rights and duties sought here by the State Board of Equalization were to be recognized there would be nothing to prevent the various States, in their search for revenue, in prescribing by State law that any person seeking to act as a receiver or trustee in bankruptcy, before entering upon his duties as such receiver or trustee in bankruptcy, and before liquidating the assets of bankrupt estates entrusted to him, should first procure a license from the State granting him the "privilege" of acting in such official capacity, such license to cost the sum of \$500.00 for each estate so administered and liquidated. One may well imagine the consternation and confusion which would result from the enactment of such a law, but we respectfully submit that if the State of California has a right to exact a license from a trustee in bankruptcy conducting a judicial sale and to require him to pay a fee of \$1.00, then it would have a right to raise the price to \$500.00, if such a right exists at all. Encroachments such as this are not accomplished in one single sweep. A crack, of an apparently innocuous nature, is usually cleverly opened and if the encroachment is tolerated, gradually expanded until it becomes intolerable. The most common instance has been the expansion by the States of penny sales taxes on gasoline, imposed first for the building and maintenance of highways, at the rate of one per cent per gallon,

increased to two or three cents for the same purpose, and then other additions made thereto, a cent or two at a time, for the State's general fund, for school purposes, for relief, and what not, with the result that taxes as high as twenty-five per cent *ad valorem* are being levied on gasoline in some States.

We submit that when the State attempts to project itself into a jurisdiction essentially federal, such attempt should be promptly nipped in the bud.

It must be borne in mind that this is not a case where the trustee is operating the business for a limited period, as provided in Subdivision (5) of Section 2 of the National Bankruptcy Act (11 U. S. C. A., Sec. 11, Subdv. (5)) which provides that courts of bankruptcy have jurisdiction to,

“Authorize the business of bankrupts to be conducted for limited periods by receivers, the marshals, or trustees if necessary, in the best interests of the estates, and allow such officers additional compensation for such services as provided in Section 48 of this Act.”

We recognize the fact that there are certain types of businesses in which any person is required to take out a license in order to operate, such as tavern keepers, liquor stores, pawnbrokers, and other businesses regulated under the police power. If the trustee desires to exercise the privilege conferred upon him under Sec. 2, Subdv. (5) of the Bankruptcy Act, of “operating the business of the bankrupt for a limited time,” there is no question but that he would be required, when exercising such privilege, to conform to the laws of the State and to the Ordinances of the municipality. Certainly we do not contend that

a trustee in bankruptcy operating, for example, a chain of taxicabs, would have the right to drive his cabs around the City of Los Angeles without a State automobile license on them. We recognize the fact that if he attempted to operate a bar, even for a limited time, without a license, he would be prosecuted for bootlegging. In neither instance would he be required to "operate the business for a limited time." His temporary operation is merely discretionary and he may avail himself of the privilege conferred under Sec. 2, Subdv. (5) of the Bankruptcy Act, or he may close down the business entirely, at once without temporary operation.

On the other hand, the conversion of the assets into cash under the direction of the court, as provided in Sec. 47-a, leaves him no discretion whatsoever; his duties are mandatory, and the carrying out of those duties is not a "privilege" as is here contended by the Attorney General.

An examination of the Attorney General's brief, pages 5 to 11 inclusive, fails to distinguish between a privilege and a mandatory duty imposed by Congress under its constitutional grant of power.

Throughout the argument in the pages cited, the Attorney General constantly refers to the "privilege" of the trustee to perform his duties in converting the assets of the bankrupt estate into cash, and at page 8 states that the trustee, in liquidating this estate, is engaged in the "business" of selling at retail and is subject to the State sales tax. The argument further goes on to say that the construction of a State statute placed thereon

by a State court is binding upon the Federal Courts. In making this statement counsel overlooks the exception to the rule that such construction does not apply in jurisdictions essentially federal.

As hereinafter pointed out, the Supreme Court of California in *Donnelly v. Southern Pacific Co.*, 18 Cal. (2d) 863, recognizes this rule in an opinion involving a judgment for damages for personal injuries sustained by a person in a railroad collision, while traveling on a free pass, regulated by Interstate Commerce Acts, and after discussing the various federal and state decisions involving the right to recover from a common carrier while riding on a free pass, the Supreme Court, in reversing the judgment of the Superior Court, said:

“This negligence may have been gross under the California rule, but the Federal cases are clear that such dereliction constitutes negligence and not wanton and reckless misconduct.”

In this connection the rules laid down by the Supreme Court of California in *Bigsby v. Johnston*, 18 Cal. (2d) 860, and *Union League Club v. Johnson*, 18 Cal. (2d) 275, are entirely beside the point. Neither *Bigsby* nor the *Union League Club* were trustees in bankruptcy, nor were their sales upon which the State imposed a tax, judicial sales conducted under a United States Statute in a United States Court; neither was any mandatory duty imposed upon them to make these sales. If they desired, they had a right to retain the property. A trustee in bankruptcy has no such right, as the statute under which his office

is created requires him to collect and reduce to money the property for which he is trustee, under the direction of the court, and to close up the estates as expeditiously as is compatible with the best interests of the parties in interest. (Bankruptcy Act, Sec. 47-a (11 U. S. C. A., Sec. 75-a).)

In the argument the dogmatic assertion is made that:

“The payment of this tax is not a charge upon the estate. It is the *duty* of the trustee in bankruptcy to collect this tax from the purchasers and to pay it into the State Treasury. He performs this *duty* in return for the *privilege of selling to consumers*, and not for resale in the State of California.” (Italics ours.)

We have scrutinized Section 47 of the Bankruptcy Act with a great deal of care and nowhere in the Bankruptcy Act do we find any such duty imposed upon the trustee, neither do we find any restrictions anywhere in the Bankruptcy Act as to what persons or classes of persons a trustee may sell assets belonging to a bankrupt estate. The only requirement that we know of is the common sense requirement that the purchaser have the cash to pay for the property. We fail to see where the performance of his mandatory duty in selling to consumers or anybody else, constitutes a “privilege” in the State of California where we have a sales tax, and does not constitute such a “privilege” in the State of Nevada, which has been free from that form of irritating gadfly in the tax field.

Any Provision in the Retail Sales Act of California or the Rules and Regulations of the State Board of Equalization Under Which It Is Contended Additional Burdens or Duties May Be Imposed Upon a Trustee in Bankruptcy, Is in Conflict With Its Applicability to Federal Law, and Is Unconstitutional.

It has long been settled that where Congress exercises its exclusive jurisdiction, as in the domain of interstate commerce, bankruptcy, naturalization, and other exclusive legislative fields delegated to it, all state laws on those subjects are superseded; as, for instance, upon the enactment of the Bankruptcy Act of 1898, after a long period during which this country had no Bankruptcy Act, all State Insolvency Laws were suspended and superseded and their courts deprived of jurisdiction over the subject. (*Holmes v. Rowe*, 97 Fed. (2d) 537, C. C. A. 9th Cir.; *In re Brinn*, 262 Fed. 527.)

In *Keystone Driller Co. v. Superior Court*, 138 Cal. 738, the court said:

“Our State Insolvency Law is suspended by the National Bankruptcy Law of 1898.”

In *Continental Building & Loan Association v. Superior Court*, 163 Cal. 579, the Supreme Court said:

“If these positions are well taken the conclusion for which petitioner contends is irresistible, for it is conceded that petitioner is a corporation conducting a business which brings it within the scope and purview of the National Bankruptcy Act, and it is unquestioned that when the general government has spoken upon the subject of bankruptcy, the operation of all state laws upon the same subject matter is suspended. The ultimate question then, is

whether under these concessions and admissions there is still left in the state law any valid provisions entirely without the scope of the National Bankruptcy Act, which provisions may be enforced by the State Courts, or whether, as petitioner contends, the state law is as a whole, and without severable or separable parts a single bankruptcy or insolvency act.”

In the latter case the Supreme Court of California held that a punitive law requiring liquidation of building and loan associations under certain conditions not constituting an act of bankruptcy, did not conflict with the Bankruptcy Act, but nevertheless, recognized the principle that when Congress has legislated on the subject, the State law is powerless.

In the recent case of *Donnelly v. Southern Pacific Co.*, 18 Cal. (2d) 863, involving a California statute and its operation on passengers traveling in interstate commerce, the Supreme Court says:

“If a statute is enacted by Congress covering the subject of the state’s regulation, it supersedes the state statute or decision. *Southern Ry. Co. v. Railroad Commission of Indiana*, 236 U. S. 439; *Southern Express Co. v. Byers*, 240 U. S. 612; *Adams Express Co. v. Croninger*, 226 U. S. 491; *Western Union Tel. Co. v. Speight*, 254 U. S. 17; *Western Union Tel. Co. v. Commercial Milling Co.*, 218 U. S. 406. If, however, Congress enacts a statute that embraces the general field but does not cover the matter on which the state has ruled, the state statute or decision is superseded only if Congress intended by such legislation to occupy the entire field, thereby excluding all state control. (*Atchison T. & S. F. Ry. Co. v. Railroad Commission*, 283 U. S. 380; *Kelly v. Washington*, 302 U. S. 1; *H. P. Welch Co.*

v. New Hampshire, 306 U. S. 79; Kansas City So. Ry. Co. v. Van Zant, 260 U. S. 459; Southern Express Co. v. Byers, *supra*,) and numerous other citations. The state courts are then bound by federal decisional law in the field. (Kansas City So. Ry. Co. v. Van Zant, *supra*; Southern Express Co. v. Byers, *supra*; Adams Express Co. v. Croninger, *supra*; Western Union Tel. Co. v. Speight, *supra*.)

In 1906 Congress passed the Hepburn Act regulating the issuance of free passes by interstate carriers. The act deals only with the classes of person to whom free passes may be issued and contains nothing about the liability of carriers to such passengers, nor the terms of the passes. Generally an act of Congress is not regarded as superseding a state statute or decision unless the two conflict or the state law stands in the way of congressional objectives. (H. P. Welch Co. v. New Hampshire, *supra*; Kelly v. Washington, *supra*; Atchison T. & S. Ry. Co. v. Railroad Commission, *supra*; Maurer v. Hamilton, 309 U. S. 598; Palmer v. Mass, 308 U. S. 79.) Nothing in the Hepburn Act conflicts with state rules on liability for negligence, and it sets forth no objective that would be hindered by the application of state law. Nevertheless, the Supreme Court of the United States took the position in Kansas City Southern Ry. Co. v. Van Zant, *supra*, that the Hepburn Act was intended to occupy the entire field of free passes, that it superseded all state law in the field, and that the decisions of the federal courts were therefore controlling on the liability of a carrier for negligence to a holder of a pass containing an exculpatory provision. This court is bound by that decision and must therefore disregard the California law and apply the rules established by the decisions of the Federal Courts."

In the case of *Moore v. Bay*, 284 U. S. 4, the court said:

“The Circuit Court of Appeals affirmed an order of the District Judge giving the mortgage priority over the last creditors. Whether the court was right must be decided by the Bankruptcy Act, since it is superior to all State laws upon the subject. *Globe Bank & Trust Co. v. Martin*, 238 U. S. 288.”

We think it is clear that Congress intended to legislate fully with regard to the qualifications and duties of trustees in bankruptcy. It has not seen fit to require them to take out sales tax license from the States permitting them to perform their mandatory duties. The fact that Congress in 1934 enacted Section 124-a of Title 28 of U. S. C. A., requiring “any receiver, liquidator, referee, trustee, or other officers or agents appointed by any United States Court, *who is authorized by said court to conduct any business and who does conduct any business*, shall, from and after June 18, 1934, be subject to all State and local taxes applicable to such business the same as if said business were conducted by an individual or corporation,” does not mean a thing in this case. In the first place it does not purport to be an amendment to the Bankruptcy Act, which expressly prescribes the duties of the trustee. In the second place the trustee here is not operating the business, but is liquidating it in accordance with the plain mandate of the law. Trustees in bankruptcy stand in a much more advantageous position than do receivers in equity, assignees for the benefit of creditors, and other types of liquidators. The Federal Courts make a distinction between the disabilities of equity receivers and of receiverships so operated and the privileges accorded to a trustee or receiver in bankruptcy. For ex-

ample, in *Southern Bell Telephone Co. v. Caldwell*, 67 Fed. (2d) 802, in discussing the question of priorities in bankruptcy as distinguished from equity receiverships, the Circuit Court of Appeals for the Eighth Circuit said:

“It is conceded that there is no decision in bankruptcy affording any support to the appellant’s claim of priority. The equity foreclosure cases like *Miltenberger v. Logansport C. & S. W. R. Co.*, 106 U. S. 286, (and a number of other cases cited) * * * are without application, and we have no occasion to review them.”

Furthermore, the very fact of the passing of the statute referred to (Section 124-a, Title 28 U. S. C. A.) indicates clearly that Congress felt that prior to June 18, 1934 trustees in bankruptcy *operating a business* under the provisions of Subdv. (5) of Section 2 of the Bankruptcy Act were exempt from all taxes imposed by States and local municipalities during the period of their operation, and by the enactment of this statute permitted States and local political bodies to levy taxes on the actual operation of such business.

It is significant, however, to note that there is no permission contained in Section 124-a, Title 28 authorizing State and local governments to tax the proceeds of judicial sales in bankruptcy, or otherwise.

It is further highly significant that the Bankruptcy Act was completely overhauled in 1938, five years after sales taxes became the rage throughout the United States. If it were the intent of Congress to require trustees to pay sales tax on the proceeds of judicial sales or to take out State licenses, it seems to us that such provision would have been placed in Section 47, which was one of the sections completely overhauled in the 1938 amendment.

Furthermore, the Supreme Court thereafter enacted General Order XVII as a supplement to Section 47 and did not see fit to impose these additional responsibilities or requirements on the trustee.

A great deal of the difficulties which trustees have been encountering with the State Board of Equalization in the last several months are occasioned by a misinterpretation of the case of *Boteler v. Ingals*, 308 U. S. 57. In that case Boteler, as trustee in bankruptcy, was operating a large dairy. He had a number of milk trucks making daily deliveries throughout Los Angeles County and operating on the public highways. On January 1st he did not have sufficient funds in his possession to purchase new license, and the same condition existed after the deadline for obtaining new licenses without penalty on February 5th had passed. Shortly after February 5th he obtained sufficient money to purchase licenses and applied to the Motor Vehicle Department for new licenses for his trucks, tendering it the normal fee. The Motor Vehicle Department refused to issue the licenses without payment of the penalty and Boteler sought mandamus from the Referee. The Referee entered an order requiring the issuance of the licenses, which order was affirmed by the District Court, both lower courts holding that the trustee was not subject to such penalty. This court reversed the order, and the Supreme Court granted certiorari. In the opinion in that case Mr. Justice Black was careful to point out that the trustee was *operating the business* and that the penalty constituted a license fee for the privilege of using the highways of the State of California, and that if the trustee saw fit to use the highways in the conduct of the business he was required to comply with the reasonable police regulations of the State.

That theory is reasonable enough. Certainly no one would contend that a trustee in bankruptcy, the Governor of California, or even the President of the United States would not be bound to comply with police regulations in connection with the use of the highways. We certainly would not contend that a trustee in bankruptcy, because he was a trustee operating a dairy business, would have a right to drive his trucks on the sidewalk instead of remaining on the pavement, or drive them sixty miles an hour across the intersection of Seventh and Broadway, but we do contend that the State of California has no right to pass legislation which hampers, interferes with or penalizes the trustee in the performance of his mandatory duties under the Bankruptcy Act. If, in the instant case, the trustee can be compelled to collect and pay sales tax on piecemeal, private, liquidating sales of the bankrupt's machinery, ovens, and other equipment, then the State Board of Equalization will have a right to place its representative in the Bankruptcy Courts each morning when assets of bankrupt estates are being auctioned off by trustees in the presence of the Referee, and to demand that the Referee and the trustee collect sales taxes on all property so sold and pay it over to the State of California. In addition thereto each trustee in bankruptcy will be obliged in each and every case to take out a license with the State of California authorizing him to conduct his judicial sales in the United States District Court rooms. Possibly the Referees in Bankruptcy, arms of the court, would likewise be expected to take out licenses for the privilege of participating in bankrupt sales in their own courts.

This analogy is not in anywise far-fetched, because the office of trustee is created in the same section of the Bankruptcy Act as is the office of referee.

Section 33 of the Bankruptcy Act (11 U. S. C. A., Sec. 61), reads as follows:

“The offices of referee and trustee are hereby created.”

Section 35 of the Bankruptcy Act (11 U. S. C. A., Sec. 63), sets forth the qualifications of referees.

As heretofore pointed out, Section 45 of the Bankruptcy Act (11 U. S. C. A., Sec. 73) specifies the qualifications of trustees. Certainly it could not be contended that the State of California would have a right to impose upon the qualifications of referees in bankruptcy the requirement that *they* obtain licenses from the State to perform their official duties, or that they pay a tax to the State for the privilege of entering orders confirming sales, or performing any other of their official duties.

The referee is appointed by the court under Section 34 of the Bankruptcy Act (11 U. S. C. A., Sec. 62). The trustee is elected by the creditors of the bankrupt at the first meeting of creditors, after adjudication; or, in some instances, is appointed by the court under the provisions of Section 44 of the Bankruptcy Act (11 U. S. C. A., Sec. 72). Both are equally officers of the court, save and except that a trustee, although he may be the same person, is an entirely different entity in each case in which he is elected, and under the contentions made by the State of California he would be required to take out a separate sales tax license in each case in which he was trustee in order to perform his official duties. It is just as reasonable to assume that the State of California could require the United States Marshal for the Southern District of California to take out a sales tax license and collect and pay over a sales tax on property

sold by him under writ of execution issued out of the court on the law or equity side, or in disposing of property libeled under the process of the United States District Court under the Pure Food and Drug Act, as it would be to require a trustee in bankruptcy whose functions in bankruptcy administration are similar to those of a United States Marshal in so far as property of the bankrupt estate is concerned, to ask for and pay the State of California for the same privilege.

Has the Trustee a Plain, Speedy and Adequate Remedy at Law Such as Would Bar Him From Injunctive Relief Here?

We believe that the contention in the lower court that the trustee is not entitled to injunctive relief is wholly and completely without merit. Here we have the situation of a State Board seeking to interfere with a trustee, an officer of the United States court, in the conduct of his mandatory duties, and demanding that he take out a license under penalty. (See Sales Tax Act, Sec. 15.)

To say that such court has not the power to protect its officers in the control and disposal of property in its possession and in the performance of their mandatory duties would, we believe, on its face, seem ridiculous. (See *Dayton v. Standard*, 241 U. S. 588.) However, Federal Courts have jurisdiction also to enjoin enforcement of an unconstitutional State statute by State officers clothed with authority to enforce it where it violates Federal Constitution.

See:

Tyson & Bro. United Theatre Ticket Officers v. Banton, 273 U. S. 418;
Pennsylvania v. West Virginia, 262 U. S. 553;
Fox Film Corp. v. Trumbull, 7 Fed. (2d) 715;
McNaughton v. Johnson, 242 U. S. 344;
Claybrook v. City of Owensboro, 16 Fed. 297;
Wells Fargo & Co. v. Taylor, 254 U. S. 175;
Caldwell v. Sioux Falls Stockyard Co., 242 U. S. 559.

The right to enjoin a state officer from enforcing a state statute claimed to violate the Federal Constitution is not affected by whether the enforcement is to be by civil or criminal proceedings.

See:

Van Deman & Lewis Co. v. Rast, 214 Fed. 827;
Yee Gee v. City & County of San Francisco, 235 Fed. 757;
Pierce v. Society of the Sisters, 268 U. S. 510.

It has been held that the institution of separate actions to recover fees paid under an alleged unconstitutional statute is not an adequate remedy at law, as was contended by the Attorney General.

See:

Wofford Oil Co. v. Smith, 263 Fed. 396.

It has also been held that a Federal Court has jurisdiction to enjoin the enforcement of a state statute which is unconstitutional and void, and under which the authorities threaten to seize complainant's property and destroy his business unless he pays a license thereby imposed.

See:

Minneapolis Brewing Co. v. McGillivray, 104 Fed. 258.

In the case at bar, under the State's theory the trustee in bankruptcy, an officer of the United States District Court, should pay this illegal tax and license fee out of funds in *custodia legis* in a Federal Court, to a State Board, and then, notwithstanding the fact that he is an officer of the United States District Court, go into the State courts and maintain expensive litigation to recover it back. Such requirement would be absolutely unreasonable. The State Board of Equalization is demanding that the Bankruptcy Court and its officers pay over to it certain sums of money, disbursement thereof being required to be made by check or draft on designated depositories of bankruptcy funds.

Bankruptcy Act, Sec. 47-a, Subdvs. (2) and (4).

These checks are required to be countersigned by the Referees. We would therefore be faced with the anomalous situation of requiring the two officers of the court designated by the National Bankruptcy Act, to pay over to a State Board sums of money in their joint possession, and then to go into the State courts and attempt to get it back. We do not believe that this court, or any other Federal Court would for a moment tolerate such round-about and expensive procedure to recover back funds which have already been in the custody of the Bankruptcy Court and subject to its exclusive summary jurisdiction.

See:

Acme Harvester Co. v. Beekman Lumber Co., 222 U. S. 300;

Murphy v. John Hoffman Co., 211 U. S. 562;

White v. Schlocrb, 178 U. S. 542;
Bryan v. Berscheimer, 181 U. S. 188;
Miller v. Nugent, 184 U. S. 1;
Hebert v. Crawford, 228 U. S. 204;
Taubel-Scott-Kitsmiller Co. v. Fox, 264 U. S.
426;
Isaacs v. Hobbs Tie & Timber Co. 282 U. S.
734.

Furthermore, the trustee is under bond, and in the payment of taxes illegally, or in his refusal or failure to pay a tax legally assessed, he may be held responsible.

See:

United States ex rel. Willoughby v. Howard, 302
U. S. 445, 35 Am. B. R. (N. S.) 258;
Matter of Lambertville Rubber Co., Inc., Debtor,
111 Fed. (2d) 45;
United States v. Kaplan, 74 Fed. (2d) 664.

If he closes the estate without making the payments demanded by the State Board of Equalization he may find himself subjected to a multiplicity of litigation and the possibility of a suit being instituted against him in the State courts for a recovery of the alleged license fee, together with the sales tax demanded, and the necessity of reopening this bankrupt estate and seeking the protection of this court from vicious and harassing litigation; all of it at his own expense, inasmuch as the bankrupt estate would have been closed and its funds distributed.

We respectfully submit that the trustee was entitled to the relief prayed for and to the protection of the court, and that the Referee and District Court were right in according him such protection.

The Contention That the Referee Acted Beyond His Jurisdiction Is Wholly Without Merits, as the Referee Is Not Seeking to Restrain a Court.

It was contended by the Attorney General in the District Court that a Referee in Bankruptcy has no power to enjoin a State officer in the enforcement of a State Statute. With that we disagree.

Section 38 of the Bankruptcy Act (11 U. S. C. A., Sec. 66) vests the Referee, subject to a review by the Judge, with jurisdiction to,

“(6) Perform such of the duties as are by this Act conferred upon Courts of Bankruptcy, including those incidental to ancillary jurisdiction, and as shall be prescribed by rules or orders of the Courts of Bankruptcy of their respective districts, except as herein otherwise provided.”

Section 2, Subdivision (15) (11 U. S. C. A., Sec. 11, Subdv. 15), vests Courts of Bankruptcy with jurisdiction to,

“Make such orders, issue such process, and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provision of this Act. Provided, however, *that an injunction to restrain a court may be issued by the Judge only.*”

General Order No. XII there cited by the Attorney General in nowise alters the Referee's jurisdiction in the case at bar. The Order of Reference in this case was a general Order of Reference. Furthermore, we are not seeking an injunction to stay proceedings of a court, of an officer of the United States or of a State, as no proceedings are pending. We are merely seeking to restrain

the illegal invasion by a certain State Board of the rights of an officer of the Bankruptcy Court.

That an injunction will lie against a State Board or Commission to prevent a violation of the rights of a party under the Federal Constitution, has been held in *Union Light, Heat & Power Co. v. Railroad Commission of Kentucky*, 17 Fed. (2d) 143; also,

Evansville Brewing Ass'n. v. Excise Commission of Jefferson County Alabama, 225 Fed. 204.

The only jurisdiction now expressly withheld from Referees under a general Order of Reference is the power of commitment for contempt. (Bankruptcy Act, Sec. 38, Subdv. (2).) Under the Act of 1938 a general Order of Reference is sufficient to vest them with jurisdiction to adjudicate bankrupts or dismiss petitions, to grant or revoke discharges, and perform many other judicial acts which under preceding bankruptcy laws they were only permitted to certify to the District Judge for determination.

We respectfully submit that the Referee did not act beyond his jurisdiction.

Conclusion.

We believe that an adverse decision in this case would create nothing but confusion in bankruptcy administration. Although the amount involved in the purchase of a retailer's license is small, if the principle is once recognized that a State Board can compel an officer of the Federal Court to take out a license for the performance of his mandatory duties and can levy taxes on the proceeds of judicial sales in the Federal Courts, then the crack is open and can be steadily enlarged. The result

would be a mess of confusion between the State Boards on the one hand and the Federal Courts on the other, in a field which has always been recognized as essentially and exclusively a Federal one, when Congress chooses to act therein.

If the contentions of the State Board of Equalization in the case at bar are sustained, not only would the trustees be required to purchase a new license for each bankrupt estate they administer (because they are different official entities in each individual), but they would be saddled with the extra accounting work incident to the making of reports to the State Board of Equalization in strictly liquidating sales.

We respectfully submit that the Orders of Referee Brink and Judge Harrison should be affirmed.

Dated: May 19, 1942.

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United States

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Circuit Court of Appeals

For the Ninth Circuit.

In the Matter of WEST HILLS MEMORIAL PARK, a corporation, Bankrupt, WM. H. B. SMITH, JR., H. J. SANDBERG, HOWARD-COOPER CORPORATION, SHELL OIL COMPANY, JAMES A. SEWELL, DRAKE LUMBER COMPANY, C. H. MARTIN GEORGE TEUFEL, HOWARD E. GOLDEN, P. E. GOLDEN, L. L. DOUGAN, WARREN H. COOLEY, OREGON SECURITIES COMPANY, CUTLER PRINTING COMPANY and OREGON SIGN & NEON CORPORATION, Appellants,

vs.

THOMAS G. DONNELLY,

I, Trustee of the Estate of West Hills Memorial Park, a corporation, Bankrupt, Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the District of Oregon.

FILED

MAR - 5 1942

United States
Circuit Court of Appeals

For the Ninth Circuit.

In the Matter of WEST HILLS MEMORIAL PARK, a corporation, Bankrupt, WM. H. B. SMITH, JR., H. J. SANDBERG, HOWARD-COOPER CORPORATION, SHELL OIL COMPANY, JAMES A. SEWELL, DRAKE LUMBER COMPANY, C. H. MARTIN GEORGE TEUFEL, HOWARD E. GOLDEN, P. E. GOLDEN, L. L. DOUGAN, WARREN H. COOLEY, OREGON SECURITIES COMPANY, CUTLER PRINTING COMPANY and OREGON SIGN & NEON CORPORATION,

Appellants,

vs.

CLARENCE X. BOLLENBACH, Trustee of the Estate of West Hills Memorial Park, a corporation. Bankrupt,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the District of Oregon.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF THE
ATTORNEYS OF RECORD

REUBEN G. LENSKE,

Yeon Building,
Portland, Oregon,
for Appellants

MOE M. TONKON,

Public Service Building,
Portland, Oregon,
for Appellee

In the District Court of the United States
For the District of Oregon

No. B 25045

In the Matter of WEST HILLS MEMORIAL
PARK, a corporation,

Bankrupt.

CERTIFICATE OF REFEREE ON PETITION
OF ATTORNEYS FOR CERTAIN CRED-
ITORS FOR A REVIEW OF THE REF-
EREE'S ORDER DECLARING FAILURE
UPON THE PART OF CREDITORS TO
ELECT A TRUSTEE AND APPOINTING
CLARENCE X. BOLLENBACK, TRUSTEE.

To the Honorable James Alger Fee and Claude
McCulloch, Judges of the Above Entitled
Court:

Estes Snedecor, the referee in bankruptcy in
charge of this proceeding, hereby makes his certifi-

cate on the petition of Reuben G. Lenske and Herbert M. Cole, attorneys for certain creditors for a review of the referee's ruling and order made at the first meeting of creditors as follows:

"In the election of a trustee Mr. Ahlgrim voted the largest in amount and Mr. Lenske voted the largest in number, and the referee declared a failure to elect a trustee and appointed Clarence X. Bollenback trustee of the bankrupt's estate and fixed his bond at \$2000.00."

The facts stated in the petition for review are substantially correct, except in the following particulars:

1. At no stage of the proceedings did the referee state that the petitioners had a majority in number and amount of creditors voting. The referee reserved his ruling until all claims had been considered and all creditors with votable claims had been given an opportunity to vote.

2. It is true that the referee's ruling and order [*1] on review was made upon Mr. Herbert Cole's miscalculation of the total amount of claims being voted by Mr. Lenske and himself; but a recheck of claims allowed and voted by the respective groups of creditors reaffirms the correctness of the referee's ruling to the effect that Messrs. Lenske and Cole voted the greater number of claims and Mr. Ahlgrim and his associates voted claims totalling the larger amount.

3. The number and amount of claims voted by each group are as follows:

CLAIMS VOTED BY MESSRS. LENSKE AND
HERBERT M. COLE FOR HERBERT M. COLE
AS TRUSTEE:

1. Cutler Printing Company.....	\$ 193.10
2. Howard E. Golden.....	125.00
3. Wm. H. B. Smith, Jr.....	1,200.00
4. George Teufel	57.50
5. Charles H. Martin.....	996.00
6. L. L. Dougan	100.00
7. P. E. Golden.....	250.00
8. Shell Oil Company.....	128.76
9. Olds, Wortman & King (Oregon Securities Co.)	120.02
10. Drake Lumber Company.....	346.46
11. Howard-Cooper Corporation	327.50
12. James A. Sewell.....	101.75
13. Warren H. Cooley.....	362.75
14. H. J. Sandberg	403.40
15. Oregon Sign & Neon Corp. (missing from file)	473.50
The Oregon Legionnaire.....	17.00
Total.....	<hr/> \$5,202.74

CLAIMS VOTED FOR THE ELECTION OF
CLARENCE X. BOLLENBACH, TRUSTEE:

1. John P. Kavanaugh by R. N. Kavanaugh, Administrator	\$2,500.00
2. Oregon Door Company, by Ahlgrim.....	75.00
3. Enterprise Planing Mill Co., by Ahlgrim.....	163.74
4. Honeyman Hardware Company, by Ahlgrim.....	157.04
5. The J. K. Gill Company, by Ahlgrim.....	76.55
6. Oregon Brass Works, by Ahlgrim.....	726.20
7. Credit Service Company, by Ahlgrim.....	889.96
8. Beasley & Stoehr, by Sidney Graham.....	393.75
Portland Chamber of Commerce.....	21.00
Oregon Funeral Directors' Assn.....	15.00
E. J. Chapman Co.....	12.50
Wm. Willing	42.50
	[2]
Electrical Products Corporation.....	7.46
Swift & Company.....	27.90
Portland Seed Company.....	12.00
Newman Brothers, Inc.....	24.00
May Hardware Company.....	22.03
The Swender Blue Print Co.....	15.30
National Iris Gardens.....	12.00
Pioneer Publishing Company.....	10.00
W. J. McCready Lumber Co.....	40.70
Hirsch-Weis Mfg. Co.	3.25
Journal Publishing Co.....	41.08
Total.....	\$5,288.96

4. It is apparent from the foregoing lists that Messrs. Lenske and Herbert M. Cole voted the greater number of claims over \$50.00 in amount and that Mr. Ahlgrim and his associates voted claims totalling the larger amount including claims of \$50.00 or less which may be counted in computing the amount of claims voted. (Section 55c of Bankruptcy Act).

5. Although the question was not raised before the referee, the court's attention should be called to the fact that the following claims were voted by Herbert M. Cole as attorney in fact, notwithstanding the fact that he acted as notary and took the acknowledgment of the creditor on the instrument by which he was appointed attorney in fact:

Cutler Printing Co.....	\$ 193.10
H. J. Sandberg.....	403.40
The Oregon Legionnaire.....	17.50

Powers so acknowledged have been held void. (See in re Grossman, 225 Fed. 1020, 34 ABR 32.)

Questions Presented

6. The only questions presented on review are: [3]

(1) Was the Referee in error in ruling that there was no election of a trustee by the creditors?

(2) Was the referee in error in overruling the objections of petitioners to certain claims where it appeared on the face of the claims that the proofs and powers of attorney were executed after the rendition of the jury's verdict on insolvency and before the formal entry of the order of adjudication?

(3) Was the referee in error in permitting R. N. Kavanaugh, Administrator of the Estate of J. P. Kavanaugh, deceased, to vote the claim of the estate in the sum of \$2500.00 over the objection of the petitioners that it was not properly itemized and the consideration therefor not sufficiently set forth?

With respect to the objections to the Kavanaugh claim, Mr. Lenske admitted that he knew that Judge Kavanaugh had rendered valuable services to the bankrupt some years ago but that he was of the opinion that the amount asked was too large. Mr. Kavanaugh stated that statements had been rendered to the bankrupt for this amount over a period of years and that it had not been questioned by the bankrupt. The referee ruled that he would give full faith and credit to the sworn statement contained in the claim and that Mr. Kavanaugh was entitled to vote the claim.

Papers Transmitted

Transmitted herewith are the following:

1. Petition for review.
2. All claims hereinbefore listed.

Dated at Portland, Oregon, this 11th day of July, 1941.

ESTES SNEDECOR,
Referee in Bankruptcy.

Notice of the filing of the foregoing certificate given July 12, 1941, to Reuben G. Lenske, Herbert M. Cole and Lester L. Ahlgrim, attorneys of record.

G. H. MARSH,

Clerk.

L. S. ROGERS,

Deputy.

[Endorsed]: Filed July 11, 1941. G. H. Marsh, Clerk. By L. S. Rogers, Deputy. [4]

[Title of District Court and Cause.]

PETITION FOR REVIEW

To the Honorable Judges of the District Court of the United States, for the District of Oregon.

Your petitioners, Wm. H. B. Smith, Jr., H. J. Sandberg, Howard-Cooper Corporation, Shell Oil Company, James A. Sewell, Drake Lumber Company, C. H. Martin, George Teufel, Howard E. Golden, P. E. Golden, L. L. Dougan, Warren H. Cooley, Oregon Securities Company, Cutler Printing Company, and Oregon Sign & Neon Corporation, appearing by Reuben G. Lenske and Herbert M. Cole, their attorneys, respectfully represent and petition as follows:

I.

Your petitioners in review are citizens of the United States and residents of the State of Oregon, and are creditors of the above named West Hills Memorial Park, a corporation, which was duly adjudged a bankrupt by the United States District Court for the District of Oregon on May 23, 1941.

II.

That said adjudication was based upon an involuntary petition filed by petitioners Wm. H. B. Smith, Jr., United Adjusters, Inc., and Cutler Printing Company on July 3, 1940, and that some of the other petitioners herein filed intervening petitions, all of which proceedings were prosecuted by

Reuben G. Lenske and Herbert M. Cole, attorneys, and after adjudication the above entitled court referred further proceedings to the Honorable Estes Snedecor, referee, and that the first meeting of the creditors was thereupon held before the Honorable Estes Snedecor, referee, on June 30, 1941.

III.

That petitioners were represented by attorneys Reuben G. Lenske and Herbert M. Cole at said meeting and that duly executed powers of attorney and proofs of claim [5] were presented at said meeting by petitioners; that the following duly verified claims were voted by petitioners for Linwood B. Cornell, to-wit:

H. J. Sandberg	\$ 403.40
Howard-Cooper Corporation	327.50
Shell Oil Company.....	128.75
James A. Sewell.....	101.75
Drake Lumber Company.....	346.46
C. H. Martin.....	996.00
George Teufel	57.50
Howard E. Golden.....	125.00
P. E. Golden.....	250.00
Wm. H. B Smith, Jr.....	1,200.00
L. L. Dougan.....	100.00
Warren H. Cooley.....	362.75
Oregon Securities Company.....	120.02
Cutler Printing Company.....	193.10
Oregon Sign & Neon Corporation.....	473.50

IV.

That thereupon Lester L. Ahlgrim, attorney at law, nominated C. X. Bollenback for trustee and

stated to the Honorable Estes Snedecor that Linwood B. Cornell advised him that he was unwilling to serve as such trustee.

V.

That thereupon petitioners duly nominated Herbert M. Cole as nominee for trustee.

VI.

That Lester L. Ahlgrim, attorney, presented on behalf of his nominee, C. X. Bollenbach, the following claims, to-wit:

Oregon Door Co.....	\$ 75.00
Enterprise Planing Mill Co.....	163.74
Honeyman Hardware Co.....	157.04
J. K. Gill Co.....	76.55
Oregon Brass Works.....	726.20
Credit Service Company.....	889.96
J. E. Windle.....	949.18
Will H. Masters.....	2,250.00

VII.

That petitioners objected to the voting of the claims of Oregon Door Co.; Enterprise Planing Mill Co.; Honeyman Hardware Co.; J. K. Gill Co.; and Oregon Brass Works on the ground that it appeared upon the face of said proofs and powers of attorney that they were executed prior to the adjudication of bankrupt; that said objections were overruled.

VIII.

That petitioners through their counsel objected to the claim of J. E. Windle, [6] among other reasons,

on the ground that he had been managing agent of bankrupt and petitioners objected to the claim of Will H. Masters on the ground, among other reasons, that he was attorney for bankrupt in the within proceedings; that said objections were sustained and that thereupon the Honorable Estes Snedecor, referee, stated that petitioners had a majority in number and amount of creditors voting.

IX.

That hereinabove petitioners refer to claims over \$50.00; that voting with petitioners was one claim under \$50.00 and numerous claims were voted by Lester L. Ahlgrim, attorney, which were under \$50.00, but that the amount of said claims was insufficient to make any difference at any stage of the election as to which presented the greatest total.

X.

That thereupon Lester L. Ahlgrim stated that R. N. Kavanaugh had several claims which he wished to vote and that R. N. Kavanaugh presented two claims, one by Lee F. Bellinger in the sum of \$1,855.09 and the other by R. N. Kavanaugh, administrator, in the sum of \$2,500.00; that a claim was also presented on behalf of Beasley & Stoehr in the sum of \$393.75, which said three claims were voted for C. X. Bollenback.

XI.

That petitioners objected to the claim of Lee F. Bellinger and the right of said claim to be voted

on the election of a trustee on the ground that he had been a director and officer of the bankrupt and was then and there a stockholder of bankrupt and said objection was sustained.

XII.

That petitioners objected to the voting of the claim presented by R. N. Kavanaugh, among other reasons, on the ground that said claim was not properly itemized and *tht* the consideration therefor was not sufficiently set forth.

XIII.

That said objection was overruled and that thereupon the referee declared that the petitioners had a majority in number, but that the claims presented by Lester L. Ahlgrim and voted for C. X. Bollenback represented a majority in amount [7] and that there was no election.

XIV.

That the referee thereupon appointed C. X. Bollenback trustee.

XV.

Petitioners further allege that the total amount of allowed claims voted by petitioners totaled \$5185.74 and the total amount of allowed claims voted by Lester L. Ahlgrim totaled \$4982.24, exclusive of claims under \$50.00 and that it was only as a result of a clerical error in computation that said total figures were not recognized by the Honorable Estes Snedecor, referee.

XVI.

That on June 30, 1941, the Honorable Estes Snedecor made and entered the following order:

“In the election of a trustee Mr. Ahlgrim voted the largest in amount and Mr. Lenske voted the largest in number, and the referee declared a failure to elect a trustee and appointed Clarence X. Bollenback trustee of the bankrupt's estate and fixed his bond at \$2,000.00.”

XVII.

That the Honorable Estes Snedecor, referee, erred in the following respects, to-wit:

1. In that he overruled the objections of petitioners to the aforesaid proofs of claim which, together with the powers of attorney, were executed prior to the adjudication in bankruptcy herein.

2. In that he overruled the objections of petitioners to the right of the claim of R. N. Kavanaugh, administrator, to be voted.

3. In that he ruled that there was no election of a trustee by petitioning creditors.

4. In that he failed to declare the election of Herbert M. Cole as trustee.

5. In that the referee entered the order of June 30, 1941, hereinabove set forth.

Wherefore, petitioners pray that the rulings and said order of the Honorable Estes Snedecor, referee, be reviewed and that the order appointing Clarence

X. [8] Bollenbach as trustee herein be set aside and dismissed and that an order be entered that Herbert M. Cole was elected trustee.

WILLIAM H. B. SMITH, JR.,
One of Petitioners.

REUBEN G. LENSKE,
HERBERT M. COLE,
Attorneys for Petitioners,
825 Yeon Building, Portland, Oregon.

State of Oregon,
County of Multnomah—ss.

I, Wm. H. B. Smith, Jr., being first duly sworn say that I am one of the petitioners herein, and that the foregoing petition is true as I verily believe.

WILLIAM H. B. SMITH, JR.

Subscribed and sworn to before me this 9th day of July, 1941.

[Seal]

R. G. LENSKE,
Notary Public for Oregon.

My Commission Expires: July 1, 1945.

Service Accepted July 9, 1941.

L. L. AHLGRIM
By E. A. BOYRIE

Copy served on C. X. Bollenbach by leaving same in his office July 9, 1941.

ROSS D. COHEN

[Endorsed]: Filed July 9, 1941. Estes Snedecor, Referee in Bankruptcy. Filed July 11, 1941. G. H. Marsh, Clerk. By L. S. Rogers, Deputy. [9]

In the District Court of the United States
For the District of Oregon,Division
No. B25045

In the Matter of WEST HILLS MEMORIAL
PARK, a corporation,

Bankrupt.

PROOF OF CLAIM

of

R. N. KAVANAUGH, Administrator of the Estate
of John P. Kavanaugh, Deceased, Creditor

State of Oregon,
County of Multnomah—ss.

At Portland, in the County of Multnomah and State of Oregon, came R. N. Kavanaugh, Administrator, of Portland in said County and State, and made oath and says:

That he hereinafter designates himself as claimant.

That said claimant is doing business at Portland, in the State of Oregon, and that affiant is duly authorized to make this proof that no usury is involved; and that said bankrupt was, at and before the filing of the petition in bankruptcy in this case, and still is, justly and truly indebted to the said claimant in the sum of \$2,500.00. That the consideration of said debt is as follows: Legal services rendered: Between May 1, 1935 and October 1, 1938.

No note has been received for said account, and no judgment has been rendered thereon: *that no part of said debt has been paid and that there are no set-offs or counter-claims to the same, except as set forth in the statement hereto attached, marked "A" and made part hereof. For which said sum, or any part thereof, this deponent says that said claimant has not, nor has any person for or on behalf of said claimant, or to this deponent's knowledge or belief, for said claimant's use had or received any manner of satisfaction or security whatsoever, except—None.

R. N. KAVANAUGH,

Administrator of the Estate of
John P. Kavanaugh, deceased (L. S.)

Subscribed and sworn to before me, this 30th day of June, 1941.

[Seal]

L. L. AHLGRIM,
Notary Public for Oregon.

My commission expires 9/14/41.

Lee F. Bellinger or the attorneys presenting this claim for allowance, are hereby constituted and appointed Attorneys-in-Fact for the claimant herein, with full authority to represent the claimant at all meetings of creditors, vote for trustee, vote or act upon any question submitted to the creditors, receive all notices and dividends or sums paid on

composition, and do and perform all things the claimant might legally do.

R. N. KAVANAUGH,

Administrator of the Estate of
John P. Kavanaugh, deceased
(L. S.)

State of Oregon,

County of Multnomah—ss.

On this 30th day of June, nineteen hundred and forty-one, before me personally came R. N. Kavanaugh, Administrator, to me personally known, who being by me duly sworn and known to me to be the same person described in and who executed the within instrument, and he acknowledged to me that he executed same. That he is the administrator of the estate of John P. Kavanaugh, deceased.

[Seal]

L. L. AHLGRIM,

Notary Public for Oregon.

My commission expires 9/14/41.

West Hills Memorial Park, a corporation
to

Kavanaugh & Kavanaugh, Dr.

Legal services rendered between May 1,

1935 and October 1, 1938\$2,500.00

[Endorsed]: Filed Jul. 11, 1941. G. H. Marsh,
Clerk.

[Title of District Court and Cause.]

OPINION

James Alger Fee, District Judge:

This proceeding is brought for the review of the rulings of Honorable Estes Snedecor, Referee in Bankruptcy, at the meeting of creditors for the election of trustee. Group One of creditors voted the greater number of claims over \$50.00, while Group Two voted the larger amount including claims of \$50.00 or less. The Referee summarily examined on objection a claim of J. P. Kavanaugh by R. N. Kavanaugh, Administrator, for services of attorney rendered to the bankrupt. This claim is not itemized. The attorney for Group One admitted that he knew valuable services to the bankrupt had been rendered. The holder of the claim was present and showed that statements had been rendered to the bankrupt for the same amount for a period of years and that the amount stated had not been questioned. Upon this basis, the Referee permitted filing and voting of the claim. The Referee also permitted over objection the voting by Group Two of certain claims where it appeared on the face thereof that the proofs and powers of attorney were executed after the rendition of the jury's verdict of insolvency and before the formal entry of adjudication.

There were certain claims presented and voted by Group One in which the attorney in fact had acted as notary [10] and taken the acknowledgment of the creditor on the instrument by which he was ap-

pointed, but specific objection was not made thereto.

Finally, based upon the situation above outlined, the Referee reserved his ruling until all claims had been considered and all creditors with votable claims had been given an opportunity to vote.

Finally, the Referee declared a failure to elect a trustee and independently made an appointment.

The allowance of the Kavanaugh claim will be considered first. It has been announced that a claim must be itemized in accordance with the statute,¹ and this rule has been applied to attorney fees.² Such rulings usually have been in affirmance of the Referee when he has disallowed a claim,³ and the claimant has refused to support it by evidence. However, the Referee has discretion as to how much argument or testimony he will hear in support or opposition to a claim before election. Usually, he should hear the matter in a summary manner and determine whether the claim was probably well founded.⁴ Here the certificate shows that the attack was made on the amount of the claim and not on its validity. Besides, the circumstances indicated that this constituted an account stated under the Oregon

1. Section 57a Bankruptcy Act, 11 USCA, §93(a) General Order 21, 11 USCA, following Section 53.

2. In re Hudson Porcelain Co., 225 F. 325, 327.

3. Hutson vs. Coffman, 100 F.(2d) 640, 642; In re Hudson Porcelain Co., *supra*, 326.

4. See in re Hartman-Blanchard Co., Inc., 278 F. 747, 748.

law.⁵ Where the claimant is present at the [11] meeting to elect a trustee and prepared to support the claim, it is not error for the Referee to allow it for voting purposes,⁶ even if the original proof be somewhat informal. Furthermore, the record on the trial of the insolvency petition will show that the petitioners introduced testimony as to the validity and amount of this claim in order to show insolvency. This fact does not create an estoppel, because the trustee is bound to scrutinize the claim until final liquidation if he discover facts which show improper allowance,⁷ but the Referee could consider such facts to determine whether the amount of the claim was proper for allowances.

There is no authority indicating that a claim filed after a finding of insolvency but before entry of the order of adjudication is invalid. The adjudication when made relates back to the filing of the petition and these claims were otherwise proper.

Finally, there was a contest, in which the one side had more claims over fifty dollars but the other had a greater amount of all claims. The rulings of the Referee just considered entered into this result. The Referee declared the creditors had failed to elect

5. *Steinmetz vs. Grennon*, 106 Oregon. 625, 634.

6. *In re Louis Elting, Inc.*, 4 F. Supp. 732, 736, Item 6.

7. *In re J. A. M. A. Realty Corporation*, 92 F.(2d) 3, 8; *Ott vs. Thurston, et al.*, 76 F.(2d), 368, 369.

and appointed a trustee. This action was valid and entirely proper under the circumstances.⁸

The court affirms the action in all particulars.

[Endorsed]: Filed September 29, 1941. G. H. Marsh, Clerk. By L. S. Rogers, Deputy. [12]

[Title of District Court and Cause.]

ORDER AFFIRMING REFEREE'S
APPOINTMENT OF TRUSTEE

The above entitled matter having come on to be regularly heard upon petition of certain creditors for a review of the Referee's order appointing Clarence X. Bollenback trustee of the estate herein and certificate of proceedings had before the referee herein having been duly filed with this court by the Honorable Estes Snedecor, Referee in Bankruptcy, objecting creditors appearing by Reuben Lenske, of their attorneys, and the trustee appearing by his attorneys, Moe M. Tonkon, and the court having heard arguments of respective counsel and having taken the matter under advisement and having rendered its oral opinion, and now being fully advised in the premises,

It Is Hereby Ordered that the order of Estes Snedecor, Referee, appointing Clarence X. Bollen-

8. In re Hartman-Blanchard, *supra*; In re Louis Elting, Inc., *supra*.

back trustee herein, be and the same is hereby affirmed in all particulars.

JAMES ALGER FEE

District Judge

Dated this 30 day of September, 1941.

[Endorsed]: Filed September 30, 1941. G. H. Marsh, Clerk, By L. S. Rogers, Deputy. [13]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Wm. H. B. Smith, Jr., H. J. Sandberg, Howard-Cooper Corporation, Shell Oil Company, James A. Sewell, Drake Lumber Company, C. H. Martin, George Teufel, Howard E. Golden, P. E. Golden, L. L. Dougan, Warren H. Cooley, Oregon Securities Company, Cutler Printing Company, and Oregon Sign & Neon Corporation, hereby appeal to the Circuit Court of Appeals for the ninth circuit from the order entered in this court on September 30, 1941 affirming the referee's appointment of Clarence X. Bollenbach as trustee of the above entitled bankruptcy estate.

REUBEN G. LENSKE,

Attorney for Appellants

above named

825 Yeon Building

Portland, Oregon. [14]

AFFIDAVIT

United States of America,
State of Oregon,
County of Multnomah—ss.

I, Sidney I. Spiegel, being first duly sworn upon oath depose and say that I am over the age of 21 and a citizen of the within county and state; that on October 29, 1941 I served the attached Notice of Appeal upon Lester L. Ahlgrim, one of the attorneys for adverse creditors in said proceeding, by leaving a duly certified copy thereof with said attorney's secretary in his office in the Pittock Block at Portland, Oregon on October 29, 1941; and I likewise served Clarence X. Bollenback on the said date by leaving a duly certified copy thereof with his secretary in his office at the Board of Trade Building in Portland, Oregon.

SIDNEY I. SPIEGEL

Subscribed and sworn to before me this 29th day of October, 1941.

[Seal]

C. G. HOLLAND

Notary Public for Oregon

My commission expires 4/6/45

[Endorsed]: Filed October 29, 1941. G. H. Marsh,
Clerk, By L. S. Rogers, Deputy. [15]

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH APPELLANTS INTEND TO RELY IN THE ABOVE ENTITLED APPEAL.

I.

The referee erred in permitting the claim of R. N. Kavanaugh, administrator, to be voted.

II.

The referee erred in permitting claims to be voted that were executed prior to adjudication.

III.

The referee erred in declaring that there was no election of a trustee.

IV.

The referee erred in failing to hold that Herbert M. Cole was elected trustee.

V.

The referee erred in entering the following order on June 30, 1941:

“In the election of a trustee Mr. Ahlgrim voted the largest in amount and Mr. Lenske voted the largest in number, and the referee declared a failure to elect a trustee and appointed Clarence S. Bollenback trustee of the bankrupt’s estate and fixed his bond at \$2,000.00.”

VI.

The District Court erred in confirming the order and rulings of the referee hereinabove set forth.

REUBEN G. LENSKE

Attorney for Wm. H. B. Smith, Jr., H. J. Sandberg, Howard-Cooper Corporation, Shell Oil Company, James A. Sewell, Drake Lumber Co., C. H. Martin, George Teufel, Howard E. Golden, P. E. Golden, L. L. Dougan, Warren H. Cooley, Oregon Securities Co., Cutler Printing Co., and Oregon Sign & Neon Corp., Appellants.

Due and legal service accepted this 26th day of November, 1941.

MOE M. TONKON

Attorney for Trustee

[Endorsed]: Filed November 26, 1941. G. H. Marsh, Clerk, By L. S. Rogers, Deputy. [20]

United States of America
District of Oregon—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, do hereby certify: That the foregoing pages numbered from 1 to 31, inclusive, constitute the transcript of record on appeal from an order of said court in a certain bankruptcy case, No. B25045, in the Matter of West Hills Memorial Park, a corporation, Bank-

rupt, William H. B. Smith, Jr., H. J. Sandberg, Howard-Cooper Corporation, Shell Oil Company, James A. Sewell, Drake Lumber Company, C. H. Martin, George Teufel, Howard E. Golden, P. E. Golden, L. L. Dougan, Warren H. Cooley, Oregon Securities Company, Cutler Printing Company, and Oregon Sign & Neon Corporation, petitioning creditors, in which the said William H. B. Smith, Jr., H. J. Sandberg, Howard-Cooper Corporation, Shell Oil Company, James A. Sewell, Drake Lumber Company, C. H. Martin, George Teufel, Howard E. Golden, P. E. Golden, L. L. Dougan, Warren H. Cooley, Oregon Securities Company, Cutler Printing Company, and Oregon Sign & Neon Corporation, petitioning creditors, are appellants, and Clarence X. Bollenbach, Trustee of the Estate of the above named bankrupt, is appellee; that said transcript has been prepared by me in accordance with the praecipes filed by said appellants and said appellee and in accordance with the rules of court; that I have compared the foregoing transcript with the original record thereof and that the foregoing transcript is a full, true, and correct transcript of the record and proceedings had in said court in said cause, as the same appears of record and on file at my office and in my custody, prepared in accordance with the said praecipe and rules of court.

I further certify that, by direction of the court, I am transmitting with said transcript of record on appeal the original proofs of claims designated

by said order to be transmitted to the Court of Appeals.

I further certify that the cost of the foregoing transcript is \$4.05 and that same has been paid by said appellants.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court, at Portland, in said district, this 22d day of January, 1942.

[Seal] G. H. MARSH,
Clerk. [32]

[Endorsed]: No. 10030. United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of West Hills Memorial Park, a corporation, Bankrupt, Wm. H. B. Smith, Jr., H. J. Sandberg, Howard-Cooper Corporation, Shell Oil Company, James A. Sewell, Drake Lumber Company, C. H. Martin, George Teufel, Howard E. Golden, P. E. Golden, L. L. Dougan, Warren H. Cooley, Oregon Securities Company, Cutler Printing Company and Oregon Sign & Neon Corporation, Appellants, vs. Clarence X. Bollenbach, Trustee of the Estate of West Hills Memorial Park, a corporation, Bankrupt, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Oregon.

Filed January 26, 1942.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit,

No. 10030

In the Matter of WEST HILLS MEMORIAL
PARK, a corporation,

Bankrupt.

DESIGNATION OF POINTS UPON WHICH
APPELLANTS INTEND TO RELY

Come now appellants and pursuant to Rule 19 of the Rules of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby designate the following points on which appellants intend to rely in the within appeal.

Major Points:

I.

The referee erred in failing to declare the election of Herbert M. Cole as trustee of the above entitled bankruptcy estate and he erred in declaring that there was no election and in appointing C. X. Bollenbach as trustee.

II.

The District Court erred in affirming the order of the referee.

Minor Points:

I.

The referee erred in permitting the Kavanaugh claim to be voted in the election of the trustee.

(a) Where a claim is objected to at the first meeting of creditors the referee should either postpone the meeting and hear objections to the claim or have a summary hearing then and there and determine the validity of the claim.

(1) The referee did neither in this instance.

(b) The Kavanaugh claim did not have an itemized statement showing the services rendered and the consideration upon which the claim was based and, therefore, was not entitled to be voted.

(c) No claim was made by said claimant that his claim was based upon an account stated and it was error for the referee to consider the claim as an account stated.

(d) A claim based upon an account stated is not relieved of the requirement that the Proof of Claim must show in reasonable detail the consideration upon which the account stated is based.

(e) Where a claimant does not present a sufficient Proof of Claim but is present at the first meeting of creditors in a bankruptcy proceeding, he must offer himself for examination under oath upon said claim before being allowed to vote thereon.

(f) Proof of claim in bankruptcy constitutes not only a pleading but also prima facie evidence and should be complete in and of itself in order to entitle the claimant to vote and participate in the estate.

(g) Admissions by counsel for objecting creditors or even belief by the referee that a claim is

valid does not make up for the failure of the Proof of Claim to be sufficient for its allowance as a claim.

II.

Proofs of Claim and Powers of Attorney executed prior to an adjudication and after trial before a jury on some of the issues may not be voted at the election of a trustee.

REUBEN G. LENSKE,

Attorney for Appellants Wm. H. B. Smith, Jr., H. J. Sandberg, Howard-Cooper Corporation, Shell Oil Company, James A. Sewell, Drake Lumber Company, C. H. Martin, George Teufel, Howard E. Golden, P. E. Golden, L. L. Dougan, Warren H. Cooley, Oregon Securities Company, Cutler Printing Company, and Oregon Sign & Neon Corporation.

Service accepted this 3rd day of February, 1942.

MOE M. TONKON

Attorney for Appellee.

[Endorsed]: Filed Feb. 4, 1942. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF ITEMS TO BE PRINTED

1. Petition for Review.
2. Certificate of Referee on Review.
3. Opinion of District Court.
4. Order of District Court affirming Referee.
5. Kavanaugh Proof of Claim.
6. Notice of Appeal.
7. Designation of Points Upon Which Appellants Intend to Rely.

REUBEN G. LENSKE

Attorney for Appellants

Service accepted this 3rd day of February, 1942.

MOE M. TONKON

Attorney for Appellee

[Endorsed]: Filed Feb. 4, 1942. Paul P. O'Brien,
Clerk.

In the United States

13

Circuit Court of Appeals

For the Ninth Circuit

In the Matter of WEST HILLS MEMORIAL PARK, a corporation, Bankrupt, WM. H. B. SMITH, JR., H. J. SANDBERG, HOWARD-COOPER CORPORATION, SHELL OIL COMPANY, JAMES A. SEWELL, DRAKE LUMBER COMPANY, C. H. MARTIN, GEORGE TEUFEL, HOWARD E. GOLDEN, P. E. GOLDEN, L. L. DOUGAN, WARREN H. COOLEY, OREGON SECURITIES COMPANY, CUTLER PRINTING COMPANY and OREGON SIGN & NEON CORPORATION,
Appellants,

VS.

CLARENCE X. BOLLENBACH, Trustee of the Estate of West Hills Memorial Park, a corporation, Bankrupt,
Appellee.

BRIEF OF APPELLANTS

Upon Appeal from the District Court of the United States for the District of Oregon.

REUBEN G. LENSKE,
Yeon Building,
Portland, Oregon,
Attorney for Appellants.

FILED

MAR 31 1942

PAUL P. O'BRIEN,

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In the United States
Circuit Court of Appeals
For the Ninth Circuit

In the Matter of WEST HILLS MEMORIAL PARK, a corporation, Bankrupt, WM. H. B. SMITH, JR., H. J. SANDBERG, HOWARD-COOPER CORPORATION, SHELL OIL COMPANY, JAMES A. SEWELL, DRAKE LUMBER COMPANY, C. H. MARTIN, GEORGE TEUFEL, HOWARD E. GOLDEN, P. E. GOLDEN, L. L. DOUGAN, WARREN H. COOLEY, OREGON SECURITIES COMPANY, CUTLER PRINTING COMPANY and OREGON SIGN & NEON CORPORATION,
Appellants,

vs.

CLARENCE X. BOLLENBACH, Trustee of the Estate of West Hills Memorial Park, a corporation, Bankrupt,
Appellee.

BRIEF OF APPELLANTS

Upon Appeal from the District Court of the United States for the District of Oregon.

JURISDICTION

Three of appellants filed an involuntary petition in bankruptcy against West Hills Memorial Park,

a corporation, in the District Court of the United States for the District of Oregon and after trial an order of adjudication and reference was entered on May 23, 1941. (See pages 7, 8 and 2 of record.) On June 30, 1941, at the first meeting of creditors the Honorable Estes Snedecor, referee, declared a failure to elect a trustee and appointed C. X. Bollenback trustee of the bankrupt estate. (Pages 12 and 2 of record.) A petition to review said order was duly filed by appellants (Page 7 of record), the referee filed his certificate on review with the District Court (Page 1 of record) and after hearing, the court entered an order on September 30, 1941 affirming the referee's order (page 20 of record). Within 30 days thereafter notice of appeal from said order was duly filed by appellants (page 21 of record).

STATUTORY PROVISIONS

Section 1 (9) of United States bankruptcy act: "Court" shall mean the Judge or the referee of the court of bankruptcy in which the proceedings are pending (10) Courts of bankruptcy shall include the District Courts of the United States. . . .

Section 2a of the Bankruptcy act: The courts of the United States herein before defined as courts of bankruptcy are hereby invested . . . with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction . . . (2) allow claims, disallow claims. . . . (17) Approve the ap-

pointment of trustees by creditors or appoint trustees when creditors fail so to do.

Sec. 24a. The Circuit Courts of Appeals of the United States. . . . are hereby invested with appellate jurisdiction from the several courts of bankruptcy . . . in proceedings in bankruptcy, either interlocutory or final, and in controversies arising in proceedings in bankruptcy, to review, affirm, revise, or reverse both in matters of law and in matters of fact.

Sec. 38. Referees are hereby invested, subject always to a review by the Judge, with jurisdiction to. . . (6) perform such of the duties as are by this act conferred on Courts of bankruptcy.

STATEMENT OF THE CASE

At the first meeting of creditors of bankrupt appellants voted 15 claims over \$50.00 and a total of \$5202.54 in amount for Herbert M. Cole as trustee. For the sake of convenience we shall call said creditors Group A. The only other group of creditors that voted, presented 8 allowed claims over \$50.00 and a total, including those under \$50.00, amounting to \$5288.96. For the sake of convenience we shall call them Group R. The referee held that Group A had a majority in number of claims over \$50.00 and Group R had a majority in amount and thereupon declared there was no election and appointed C. X. Bollenbach as trustee.

Group R had presented three claims for voting that were objected to by Group A and the objections were sustained. These were the claims of the managing agent of the bankrupt, the secretary of the bankrupt and the attorney for the bankrupt in the bankruptcy proceedings. Amongst the 8 allowed claims that were voted by Group R was a claim in the sum of \$2500.00 by R. N. Kavanaugh, as administrator of the estate of J. P. Kavanaugh, deceased. This claim was objected to by Group A and the objections were overruled by the referee.

The Kavanaugh proof of claim contained the following allegation: "That the consideration of said debt is as follows: Legal services rendered: Between May 1, 1935 and October 1, 1938." (Page 14 of record.) Attached to the claim is the following statement (Page 16 of record)

"WEST HILLS MEMORIAL PARK, a
corporation
to
KAVANAUGH & KAVANAUGH, DR.
Legal services rendered between May 1,
1935 and October 1, 1938.....\$2,500.00"

No further statement of the consideration upon which the claim is based or itemization of services rendered or particularization of the sums claimed for specific service appears on the proof of claim.

Including the \$2500.00 Kavanaugh claim, Group R voted only 8 allowed claims over \$50.00 to Group A's 15 claims over \$50.00 and therefore Group A clearly had a majority in number of allowed claims

over \$50.00. Including the \$2500.00 Kavanaugh claim Group R had a total in amount of \$5288.96 against \$5202.54 of Group A or a greater amount by \$86.42. If the Kavanaugh claim had not been allowed to vote Group A would have had 15 claims over \$50.00 as against 7 claims over \$50.00 for Group R and Group A would have had a total in amount of \$5202.54 against \$2788.96 for Group R or a greater amount by \$2413.58. Clearly, therefore, if the objection of Group A to the right of the Kavanaugh claim to be voted at the first meeting of creditors was well taken, there was an election of Group A's candidate for trustee.

Amongst the claims voted by Group R and allowed by the referee were five claims totalling \$1198.53. These together with the powers of attorney through which they were voted, had been executed prior to adjudication. If the objection of Group A to the right of these five claims to be voted was well taken Group A had a majority in amount as well as number even if the Kavanaugh claim were duly proved.

SPECIFICATION OF ERRORS

I.

The Referee erred in overruling the objections of Group A to the right of the Kavanaugh claim to be voted in the election of a trustee.

A. A claim for services as an attorney for a bankrupt should be excluded from voting in the elec-

tion of a trustee.

B. A proof of claim must set forth the particulars and items upon which the consideration is based; else it may not participate in voting or dividends.

C. Claims for legal services are not duly proved and should not be allowed unless the services are specifically itemized in the proof of claim.

II.

The referee erred in permitting Group R to vote claims that were executed prior to adjudication.

III.

The Referee erred in failing to declare the election of Herbert M. Cole as trustee.

IV.

The District Court erred in affirming the order of the referee.

Specification I.

The Referee erred in overruling the objections of Group A to the right of the Kavanaugh claim to be voted in the election of a trustee.

A.

A claim for services as an attorney for a bankrupt should be excluded from voting in the election of a trustee.

AUTHORITIES

Beale vs. Snead, C.C.A. 4th Cir., (Va.) 1936.
81 Fed. (2d) 970, 30 A.B.R.N.S. 443, 565 S. Ct.
956, 298 U.S. 685, 80 L. Ed. 1404, Rehear-
ing denied 57 S. Ct. 5, 299 U.S. 619, 81 L.
Ed. 457.

The Circuit Court of Appeals said on page 970 :

“As Mr. Catterall’s claim was for services rendered the bankrupt as attorney, it was properly excluded from voting in the election of the trustee.”

B.

A proof of claim must set forth the particulars and items upon which the consideration is based; else it may not participate in voting or dividends.

AUTHORITIES

Bankruptcy Act, Sec. 57(a), Title 11 U.S.C.A.
Sec. 93(a).
U. S. Supreme Court General Order XXI, (1),
11 U.S.C.A. Sec. 53.
6 Am. Jur. page 567, Sec. 90.
8 C.J.S. 1293.
Gilbert’s Collier on Bankruptcy (4th Ed.)
Sec. 1021, page 758.
U.S.C.A., Title 11, Bankruptcy, Sec. 93, subd.
(a), page 222, par. 8. See numerous cases
cited under said paragraph.
Vol. 2, Remington on Bankruptcy (4th Ed.)
Sec. 721, page 151, Note 7; Secs. 731, 732,
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In re Louis Elting, Inc., D.C.N.Y. 1933, 4 Fed.
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In re Hudson Porcelain Co., D.C.N.Y. 1915,
225 F. 325.

Wireless Telegraph Co., D.C. Me. 1912, 201 F. 445, 29 A.B.R. 848.

In re Louis Elting, Inc., D.C.N.Y. 4 Fed. Supp. 732, 25 A.B.R.N.S. 57.

In re Scott, 93 F. 418, 1 A.B.R. 553.

In re Creasinger, 17 A.B.R. 538, 1906 (Cal. Ref.).

In re Federal Silk Hosiery, C.C.A. N.Y., 68 F. (2d) 899, point 2.

Bankruptcy Act, Sec. 57(a), 11 U.S.C.A. Sec. 93(a)

“Proof of claims shall consist of a statement under oath, in writing, signed by a creditor setting forth the claim, the consideration therefor . . .”

U. S. Supreme Court General Order XXI (1),

11 U.S.C.A. Sec. 53, page 28

“ . . . Depositions to prove debts existing in open accounts shall state when the debt became or will become due; and if it consists of items maturing at different dates the average due date shall be stated, in default of which it shall not be necessary to compute interest upon it. . .”

6 Am. Jur. 567

“Care and particularity are required in the preparation of a proof of claim, for it is both the creditor’s pleading and his evidence and makes for him a *prima facie* case. It must be made as provided in the Bankruptcy Act and the Forms prescribed by the Supreme Court, and a proof made in the form of ordinary pleadings, although setting up a good cause of action, is insufficient.”

Gilbert's Collier on Bankruptcy (Fourth Edition)
page 758.

"1041. STATEMENT OF CONSIDERATION.—The statement as to consideration must be sufficiently full and explicit to enable the trustee and creditors to investigate as to the fairness and legality of the claim. It must be sufficient to enable the referee passing on it to do so intelligently and judicially. It will not be sufficient to merely state that the consideration was 'for legal services,' or 'for goods, wares and merchandise.' The statement of the claim should be itemized and should set forth the dates of the several items where possible."

Remington on Bankruptcy, Vol. 2 (4th Ed.) p. 156.

"The proof is the sworn statement by which a creditor presents his claim to the court's consideration; allowance is the judicial action by which the validity and amount of a claim is established for participation in the distribution of dividends and for the purpose of voting at meeting of creditors. Care and particularity are required in the preparation of a proof of claim in bankruptcy, for it is both the creditor's pleading and his evidence and makes for him a *prima facie* case.

"The court, apparently, has no authority to allow any claims except such as have been 'duly approved.'"

Page 165,

"ACCOUNT TO BE ITEMIZED.—In carrying out and interpreting the statutory requirement that the consideration must be stated, the Supreme Court has prescribed in its General Order XXI that if the claim is upon an account the account must be in detail, that is to say, be itemized, and be attached to the affidavit. This

is so even in the case of an account for legal services. The items must be dated and described."

In the Matter of Creasinger, 17 A.B.R. 538, quoting from page 545:

"As tested by these rules, it is apparent that the item of \$605.95 in the claim of C. L. Shinn, and the item of \$2,974.90, made up of \$2,753.55, in the name of E. C. Hine, and \$221, part of the \$700.30 claim of C. L. Shinn, cannot be approved. The statement of the consideration is not sufficiently specific and full to enable the trustee or creditors to pursue any proper and legitimate inquiry as to the fairness and legality of that claim. The claims are so meagre and general in their character that they must clearly be held insufficient. It is not even apparent therefrom whether the claim is upon an express contract for a specific amount of money which was agreed to be paid by the bankrupt to Messrs. Shinn for their services, or whether it is upon an implied contract for the reasonable value of such services. It does not even appear that the services were reasonably worth the amount alleged to be charged therefor.

"The statement of the consideration ought to be such as, if true, not to put the creditors or trustee upon proof, or require oral explanation from the claimants. It is no answer to this position that it would thereby become incumbent on the part of the claimants to state the testimony upon which he relies to support his claim. The law requires it; creditors and trustees are entitled to it. The proof of claim is not a pleading; it is a deposition which must set forth the evidence with particularity."

In re Hudson Porcelain Co., 225 F. 325.

Frank E. Parham filed a proof of claim against the bankrupt's estate based on legal services. The claim was objected to for want of sufficient statement of the claim and the consideration therefor. The court, commencing on the bottom of page 326, states:

"In addition, the statute (section 57d) provides that 'claims which have been duly proved shall be allowed,' unless objections are interposed, etc. Claims which do not comply with the requirements of the statute are not 'duly proved.' They are not, therefore, entitled to allowance."

Also on the bottom of page 327,

"This is but a general statement that the consideration of the debt is for legal services rendered during a certain period of time, without specifying the nature of the matters in which they were rendered, whether in litigation or what, except in the one particular of the preparation of the schedules to be filed in this bankruptcy proceeding. It does not specify the dates or the number of times the claimant appeared for the corporation at Trenton, or the purpose thereof. It is silent as to the amount of time given by the claimant to the affairs of the corporation. It fails to state whether the amount claimed was agreed upon between the claimant and the corporation, or whether the amount which he claims is what he considers the services reasonably worth. In short, it affords the trustee and the creditors no means of making a proper investigation to ascertain whether the amount claimed is fair and reasonable or what services were actually rendered."

To allow this lumped claim is to violate the authorities cited and the very reason for the rule. This \$2,500.00 claim which was insufficient in content to form the valid basis of a proved claim constituted almost one-fourth of the total amount that the referee allowed to vote. If the whole of it were eliminated from voting, Group A would have had a majority in both number and amount by about 100%. If the requirement of itemization would have reduced the claim by only \$86.43 and the claim were otherwise properly votable, Group A would still have had the necessary majority in number and amount. The law against lumping of claims for evidenciary purposes should be retained.

C.

Claims for legal services are not duly proved and should not be allowed unless the services are specifically itemized in the proof of claim.

AUTHORITIES

See cases cited under specification 1 B.

Specification II.

The referee erred in permitting Group R to vote claims that were executed prior to adjudication.

Following are the claims voted by Group R which, together with powers of attorney, were executed prior to May 23, 1941, the date of adjudication:

Oregon Door Co.....	\$75.00
Enterprise Planing Mill Co.....	163.74
Honeyman Hardware Co.....	157.04
J. K. Gill Co.....	76.55
Oregon Brass Works.....	726.20
	<hr/>
	\$1198.53

The chief reason for denial of the right to vote claims which, together with powers of attorneys, are executed prior to adjudication is one of public policy. An alleged bankrupt who contests involuntary bankruptcy proceedings may very well use the period of contest as a breathing spell within which to direct the claims of many creditors into channels that will be favorable to it or him when bankruptcy occurs. Until he files his schedules he alone knows who and where all his creditors are. While petitioning creditors are bearing the burden of the proceedings against alleged bankrupt for the benefit of all creditors, excellent opportunity is afforded for the bankrupt to line up creditors for an apparently neutral or disinterested person as trustee. In most involuntary cases thorough investigation of bankrupts and the prosecution of suits to set aside preferences or fraudulent conveyances are essential for the best interests of creditors and good business ethics. Energetic investigation and proper prosecution of suits by a trustee will often be abnormally tempered by the consciousness of having been elected trustee through the efforts of the prosecutee. Nor should persons on the sidelines while the involuntary proceedings are being fought be given opportunity

in the meantime to line up claims and powers of attorney for themselves to gain the fees of liquidation. There should be no scramble for the corpse before the body is declared dead. It may be significant in this case that the manager of bankrupt, its secretary and its attorneys attempted to vote with Group R in this case. In any event the same good policy forbidding attorneys for bankrupt to vote at elections of trustees (*Beale vs. Snead, supra*) should also prevent the voting of claims and powers of attorney executed prior to adjudication.

Specification III.

The referee erred in failing to declare the election of Herbert M. Cole as trustee.

AUTHORITIES

In re Federal Silk Hosiery Works, Inc., *supra*.

In this case the referee declared that one group of creditors voted a majority in number of claims and another group voted a majority in amount and that there was no election. Upon review to the District Court the referee was affirmed but the Circuit of Appeals held that the objection to one of the claims should have been sustained and thereupon an election declared. The Court states on page 900:

“It seems evident from the record that the details showing a proper basis for the claim of

Clara Rosenthal were not furnished either in her proof of claim or in any evidence submitted to the referee or to the District Judge."

No question has or could properly be raised as to the qualifications of Mr. Cole for the trusteeship. He is especially well qualified in that he became thoroughly familiar with the complicated and detailed facts concerning bankrupt while representing the petitioning creditors in the trial on the involuntary proceedings.

Specification IV.

The court erred in affirming the order of the Referee.

The reasons heretofore given for errors on the part of the Referee apply likewise to the order of the District Court which affirmed the Referee but the court's opinion (page 17 of record) contains statements with which we beg to differ.

Paragraph XII of the petition to review (page 11 of record) states as follows:

"That petitioners objected to the voting of the claim presented by R. N. Kavanaugh, among other reasons, on the ground that said claim was not properly itemized and that the consideration therefor was not sufficiently set forth."

The Referee's certificate (page 2 of record) states:

"The facts stated in the petition for review are substantially correct, except in the following particulars."

No exception is made to said paragraph XII of the petition to review. However, in the top paragraph on page 6 of the record appears an explanation by the Referee as to his ruling on the Kavanaugh claim. He states that:

“Mr. Lenske admitted that he knew that Judge Kavanaugh had rendered valuable services to the bankrupt several years ago but that he was of the opinion that the amount asked was too large.”

The opinion of an attorney even if construed as an admission is not a determining factor in the validity of a bankruptcy Proof of Claim. The Proof of Claim must stand on its own ground. The opinion or knowledge of an attorney or even the Referee should not and cannot legally make up for a deficient Proof of Claim. It is the duty of the Referee to disallow on his own motion and without objection Proofs of Claim that do not show in detail the consideration upon which they are based. See Remington, Vol. 2, 4th Ed., Sec. 1007.

The Referee proceeds further in his explanation and states:

“Mr. Kavanaugh stated that statements had been rendered to the bankrupt for this amount over a period of years and that it had not been questioned by the bankrupt.”

In the District Court's opinion, it is stated:

“Where the claimant is present at the meeting to elect a trustee and prepared to support the claim, it is not error for the Referee to allow

it for voting purposes, even if the original Proof of Claim be somewhat informal.”

The court does not give sufficient weight to the decisions hereinbefore cited. Failure to set forth the consideration in detail is a failure to make the necessary Proof. It is a failure to present sufficient testimony to make a *prima facie* case. It is an attempt to rely upon a pleading in lieu of evidence. This is a failure in substance and not merely in form.

Furthermore, the facts do not bring this case within the decision in *re Louis Elting, Inc., Supra*. In that case the claimant himself was present and not his Administrator. There is a difference between an obligee being present and offering to give the facts concerning his services and an administrator or an assignee being present. However, the administrator, R. N. Kavanaugh, did not offer to testify under oath and supply the necessary detailed information. Nor does the referee state that he did. The Referee's explanation merely states:

“Mr. Kavanaugh stated that statements had been rendered to the bankrupt for this amount over a period of years and that it had not been questioned by the bankrupt.”

The statement was not made under oath and it merely attempts to circumvene the requirement that detailed information be given in support of a claim for legal services. If the court should choose to follow the Elting case against the vast array of cited

authorities, the Elting case ruling should not be extended.

The court's opinion also states (page 19 of record) :

“Furthermore, the record on the trial of the insolvency petition will show that the petitioners introduced testimony as to the validity and amount of this claim in order to show insolvency”

and added that this did not create an estoppel. Truly, the fact that petitioning creditors called upon various claimants to testify concerning their claims in the determination of the total amount of indebtedness of the company would not determine the validity or amount of such claim for allowance. On the contrary, it may very well be that after hearing a witness testify as to his claim on the issue of insolvency, a creditor might determine that such claim should be objected to on account of the weakness or inconsistency of the testimony adduced. If what had previously occurred in that respect should be considered, greater reason exists for holding in this case that the claimant should have made available in court a Proof of Claim in writing showing in detail the services rendered and the respective amounts charged for such services. The claimant is an attorney. The decisions requiring particular care in the preparation of a Proof of Claim should be no less binding upon an attorney than a layman.

The District Court also states in its opinion that under the Oregon law :

"The circumstances indicated that this constituted an account stated."

The case cited in the court's opinion, *Steinmetz vs. Grennon*, 106 Ore. 625, 212 Pac. 532, certainly would not change the substantive law herein cited under Specification II B. Not only in Oregon but throughout most states a promise to pay for merchandise or services may be either express or implied. Nevertheless, a Proof of Claim in Bankruptcy must set forth in detail the consideration for the liability. It is even held that the consideration for a note, which in and of itself imports a consideration, must be set forth in the Proof of Claim. See *Remington*, Vol. 2, 4th Ed. Sec. 731.

CONCLUSION

For the reasons given in the Assignments of Error set forth, the orders of the referee and the District Court should be reversed and the candidate of Group A should be declared duly elected trustee of the above entitled estate.

Respectfully submitted,

REUBEN G. LENSKE,

Attorney for Appellants.

No. 10030

In the United States
Circuit Court of Appeals
For the Ninth Circuit

In the Matter of WEST HILLS MEMORIAL PARK, a corporation,
Bankrupt, WM. H. B. SMITH, JR., H. J. SANDBERG, HOWARD-
COOPER CORPORATION, SHELL OIL COMPANY, JAMES A.
SEWELL, DRAKE LUMBER COMPANY, C. H. MARTIN, GEORGE
TEUFEL, HOWARD E. GOLDEN, P. E. GOLDEN, L. L. DOUGAN,
WARREN H. COOLEY, OREGON SECURITIES COMPANY, CUTLER
PRINTING COMPANY and OREGON SIGN & NEON CORPORATION,
Appellants,
vs.

CLARENCE X. BOLLENBACK, Trustee of the Estate of West Hills
Memorial Park, a corporation, Bankrupt, *Appellee.*

Brief of Appellee

Upon Appeal from the District Court of the United States
for the District of Oregon.

REUBEN G. LENSKE,
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Attorney for Appellants.

SAMUEL B. WEINSTEIN
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WARREN H. COOLEY, OREGON SECURITIES COMPANY, CUTLER
PRINTING COMPANY and OREGON SIGN & NEON CORPORATION,
vs. *Appellants,*

CLARENCE X. BOLLENBACK, Trustee of the Estate of West Hills
Memorial Park, a corporation, Bankrupt, *Appellee.*

Brief of Appellee

Upon Appeal from the District Court of the United States
for the District of Oregon.

STATEMENT OF JURISDICTION

This is an appeal from an order of the United States District Court for the District of Oregon affirming a ruling of the Referee in Bankruptcy where in the Referee held that there was a failure to elect a trustee, and thereupon appointed the appellee, Clarence X. Bollen-

back, as trustee of the bankrupt estate. The appellants, being aggrieved with the ruling of the Referee, and the District Court, brought this appeal under Title 11, Section 47a, U.S.C.A., as amended.

STATEMENT OF THE CASE

An involuntary petition in bankruptcy was filed on July 3, 1940, in the United States District Court for the District of Oregon against the West Hills Memorial Park, a corporation engaged in the operation of a cemetery near the vicinity of Portland, but located in Washington County, Oregon. The issue of insolvency was tried before a jury resulting in the holding that the said West Hills Memorial Park was insolvent, and thereupon an order of adjudication was duly made and entered on the 23rd day of May, 1941.

At the first meeting of creditors of the bankrupt held before Honorable Estes Snedecor, Referee, two groups of creditors were present and duly presented claims against the bankrupt, and participated in the voting for the election of a trustee. Group A presented and voted fifteen claims totalling \$5202.54 in favor of Herbert M. Cole, as trustee. Group B presented and voted eight claims which, together with those under \$50.00, amounted

to \$5288.96 in favor of Clarence X. Bollenback, as trustee.

Among the eight claims that were voted by Group B in favor of Clarence X. Bollenback, was a claim in the sum of \$2500.00 by R. N. Kavanaugh, as Administrator of the Estate of his father, Judge J. P. Kavanaugh, deceased. To this claim Group A interposed objections. The Administrator as the claimant was present at the time the objections were made and the Referee, upon a summary hearing held at the time, as to the character of the claim, overruled the objections and allowed the claim to be voted.

Among the claims voted by Group B five claims had been executed after the jury found on the issue of insolvency, but prior to the entry of the formal order of adjudication. The objections to these claims on that ground were likewise overruled by the Referee.

When the vote was taken the Referee ruled that Group A had a majority in number of claims and that Group B had a majority in amount, and hence determined that the creditors did not elect and thereupon appointed Clarence X. Bollenback as trustee of the said bankrupt estate. The said trustee thereupon qualified and assumed the duties of trustee of said estate.

SPECIFICATIONS OF ERROR

The petitioners contend that the Referee and likewise the District Court of the United States for the District of Oregon erred in overruling the objections of the appellant's to the right of the Kavanaugh claim to be voted for the election of a trustee, and secondly that the Referee and likewise the District Court of the United States for the District of Oregon erred in permitting a number of claimants in Group B to vote claims that were executed prior to adjudication but subsequent to the jury's verdict on the issue of insolvency, and thirdly that the Referee and likewise the District Court of the United States for the District of Oregon erred in holding that there was no election, and thereupon making necessary the appointment of a trustee.

ISSUES INVOLVED

The germaine issues involved in this appeal are: (1) whether the Kavanaugh claim should have been permitted to vote at the first meeting of creditors for the election of a trustee, and (2) whether the claims properly executed after the issue of insolvency was determined by the jury, but prior to the entry of the formal order of adjudication, should have been permitted to participate in the voting for the trustee at the first meeting of creditors.

POINTS AND AUTHORITIES

A

Claims for legal services rendered to the bankrupt prior to bankruptcy, if otherwise valid, are provable and allowable in bankruptcy.

Adams vs. Napa Cantina Wineries,
94 F. (2d) 694; 36 A. B. R. (N. S.) 8;
2 Remington on Bankruptcy, (4th Ed.) 229.
Re Goldstein, 199 F. 665.

B

The filing of a proof of claim duly verified asserting a claim valid on its face is prima facie evidence of its provability and allowability.

Whitney vs. Dresser,
200 U. S. 535; 50 L. ed. 584;
15 A. B. R. 326.

Moore vs. Crandall,
205 F. 689; 30 A. B. R. 517.

Dickinson vs. Riley,
86 F. (2d) 385.

Durrance vs. Collier,
81 F. (2d) 4.

In re Hannevig,
10 F. (2d) 941.

C

Where the claimant is present at the meeting to elect a trustee and prepared to support the claim, it is not error for the referee to allow it for voting purposes.

In re Louis Elting Inc.,
4 F. Sup. 732.

Baumbauer vs. Austin,
186 F. 260.

The Kavanaugh claim constituted an account stated under Oregon law and was therefore not subject to the objection that the claim should set forth the particular items of service.

Steinmetz vs. Grennon,
106 Ore. 625.

D

A finding of fact by a referee is conclusive unless there was no evidence to support it.

Kowalsky vs. American Employers Ins. Co.,
90 F. (2d) 476.

In re Newman,
CCH, Sec. 53,675, decided March 12, 1942.

E

The line of cleavage with reference to the condition of the bankrupt estate is as of the time the petition was filed and the date of the adjudication relates to the time of the filing of the petition.

Vol. 4, Remington on Bankruptcy,
(4th Ed., Sec. 1377.)

Everett vs. Judson,
228 U. S. 474;
57 L. ed. 927.

ARGUMENT

A

The appellant contends that a claim for services as an attorney for a bankrupt should be excluded from voting in the election of a trustee, and in support of that contention cites the case of *Beale vs. Smead*, 81 F. (2d) 970.

We respectfully submit that the contention is untenable, and the case cited fails to support the proposition suggested. We concede that in certain circumstances a claim of an attorney for services rendered the bankrupt prior to bankruptcy and who continues to represent the bankrupt in the bankruptcy proceeding, would be prop-

erly disallowed for voting purposes, in order that possible collusion in the selection of a trustee would be avoided, but no case has been cited, and we respectfully submit that none can be found to uphold the general proposition that an attorney who represented the bankrupt and performed legal services on his behalf many years prior to bankruptcy, and who is no longer representing the bankrupt, that such a claim should be disallowed.

In the Beale case the claim that was disallowed for voting purposes was the claim of an attorney who represented the bankrupt in the bankruptcy proceeding. We further submit that the general law is that a claim for legal services rendered to the bankrupt prior to bankruptcy if otherwise valid is provable and allowable in bankruptcy, and has the same standing as the claim of any other creditor.

In the case of *Adams vs. Napa Cantina Wineries Inc.*, 94 F. (2d) 694, the question was raised as to whether or not attorney's fees for services rendered in filing action on the note prior to debtor's petition under Section 77b of the Bankruptcy Act, 11 U.S.C.A. 207, was provable. In holding that such a claim is provable, the court said:

"Likewise attorney's fees for services rendered in filing action on the note prior to the filing of debtor's petition are provable."

In the instant case the claim was presented by the administrator of Judge J. P. Kavanaugh, deceased, who performed services for the bankrupt between May 1, 1935, and October 1, 1938, long before the bankruptcy of the corporation, and when the relationship of attorney and client had long since ceased to exist.

In fact the claim of Will Masters, the attorney for the bankrupt in this proceeding was objected to and the objection sustained by the Referee, and said claim was not allowed to vote.

B

The appellant further contends that a proof of claim must set forth the particulars and items upon which the consideration is based, else it should not be permitted to participate in the election of a trustee.

While we have no quarrel with that general proposition of law, we submit, however, that it has no application to the instant case. The objection that was directed towards the Kavanaugh claim was not that it was not a valid claim, but rather that it was not particularized.

It is to be noted that at the time the objection was urged to said claim, the referee heard the matter in a summary manner. Mr. Kavanaugh, the administrator,

informed the court and those present, that the services were rendered between 1935 and 1938 by his father, and that statements for the amount upon which the claim was based had been rendered to the bankrupt from time to time, and never questioned. Mr. Lenske, representing the objecting creditors, stated that he knew that Judge Kavanaugh had rendered valuable services to the bankrupt for over a period of years. And further the record on the trial of the insolvency petition showed that the petitioners (appellants herein) introduced testimony as to the validity and amount of the Kavanaugh claim in order to show insolvency. While this fact is not conclusive, the referee could consider such fact upon summary hearing to determine whether the amount of the claim was proper for allowance. Thus, the finding by the referee that the claim was valid as presented, is a finding that carries finality and should be conclusive unless there was no evidence to support it. *Re Kowlasky vs. American Employers Company*, 90 F. (2d) 476; *In Re Newman*, (decided March 12, 1942, CCA (6th) C.C.H., Sec. 53,675).

Moreover claimant, R. N. Kavanaugh, as administrator, was present, was subject to examination and cross-examination, and under these circumstances it has been held, *In Re Louis Elting, Inc.*, 4 Fed. Sup. 732,

that it would remove the objection that the claim was not itemized.

In Re Louis Elting, Inc., 4 F. Sup. 732, objection was made to a claim because it did not set forth the character of the merchandise sold and delivered by the creditors, but the creditor was present and tendered himself for examination in the event it was desired. In affirming the holding the referee that the objection was not sufficient, the District Court for the Southern District of New York, held:

“In proceedings for election of a trustee in bankruptcy, proof of claim, although not setting forth character of merchandise sold and delivered, was sufficient where the creditor was present and supplied necessary information and tendered himself for further cross-examination if desired.”

It is suggested by the appellants that the ruling in the Elting case should not be extended for the reason that “there is a difference between an obligee being present and offering to give the facts concerning his services, and an administrator or an assignee being present.” We fail to understand that distinction or to see any difference. Moreover the general practice is that upon an objection to a claim, the referee has discretion as to whether or not the same should be permitted

to be voted, although it may subsequently be subject for reconsideration as to whether the claim would be allowed in whole or in part. Unless there is an abuse of that discretion, the referee's determination should not be disturbed.

We submit further that the objection on the ground that the claim was not itemized and did not express the consideration is untenable, for the reason that the Kavanaugh claim was based on an account stated under the laws of the State of Oregon, and therefore did not require a bill of particulars in order to comply with the bankruptcy provisions in regard to the itemization of a claim. As heretofore pointed out, the claim was based on services rendered between 1935 and 1938, for which services statements setting forth the amount was sent to the bankrupt with no objections ever being made thereto by the bankrupt. Under these circumstances the proof was not on a running open account, but rather upon an account stated.

Steinmetz vs. Grennon, 106 Or. 625, was an action upon an alleged account stated arising out of a copartnership venture. The defendant denied that any balance was struck, and particularly denied that the account was stated as alleged in the complaint. In discussing whether or not the account was stated or otherwise, the Supreme Court of the State of Oregon, said:

“An account stated is an agreement between persons who have had previous transactions of a monetary character fixing the amount due in respect to such transactions and promising payment: *Truman vs. Owens*, 17 Or. 523 (21 Pac. 665); *Holmes vs. Page*, 19 Or. 232 (23 Pac. 961); *Crawford vs. Hutchinson*, 38 Or. 578 (65 Pac. 83).

“Since an account stated is an agreement, it, like any other agreement, cannot be said to exist unless the minds of the parties have met. The parties must agree that the balance struck is correct. *The agreement may result from acquiescence implied from the failure to object to an account rendered by one party to the other*; or an account stated may result where the parties meet and go over other accounts and strike a balance in favor of one of them and the other assents to the balance as correct. The form of the assent is generally immaterial, for it may be express or it may be implied from the conduct of the parties and the circumstances of the case. If, in the instant case, there was an account stated, it was one where the parties met and after going over their accounts agreed upon the balance due from one to the other.

“An account stated involves as a necessary element a promise to pay the balance ascertained to be due. This promise may be express; but if it is not actually expressed the law will imply a promise to pay when the parties agree upon the amount due or when their conduct justifies the inference that they have agreed.”

We submit that under the above Oregon decisions, in light of the record in this case, that the Kavanaugh claim is based on an account stated, which removes the

objection that it failed to set forth the items upon which services were rendered.

We further submit that it was incumbent upon the appellants, when the objection was made to the Kavanaugh claim, to go forward and present evidence in support of such objection, and having failed to do so, the Referee was warranted in permitting the claim to be voted. The duly verified claim is *prima facie* evidence of its validity.

In the case of *Whitney vs. Dresser*, 200 U. S. 535, 50 L. ed. 584, the Supreme Court said:

"The only question warranting the appeal is whether the sworn proof of claim is prima facie evidence of its allegations in case it is objected to. It is not a question of the burden of proof in a technical sense—a burden which does not change whatever the state of the evidence—but simply whether the sworn proof is evidence at all.

"The Circuit Court of Appeals observed that the proof of claim warrants the payment of a dividend in the absence of objection, and therefore, must have some probative force. In reply it is argued that what is done in default of opposition is no test of what is evidence when opposition is made; that a judgment may be entered on a declaration for want of an answer, yet a declaration is not evidence; that it is contrary to analogy to give effect to an *ex parte* affidavit, and that on general principles it is the right of any party against whom a claim is made to have it proved, not only upon oath, but subject to cross-examination.

"Notwithstanding these forcible considerations we

agree with the Circuit Court of Appeals. The prevailing opinion, not only in the Second Circuit, but elsewhere, seems to have been that way * * * The alternative would be that the mere interposition of an objection by any party in interest, section 57d, would require the claimant to produce evidence. For if the formal proof is no evidence a denial of the claim must have that effect. If it does not, then the formal proof is some evidence even when there is testimony on the other side. The words of the statute suggest, if they do not distinctly import, that the objector is to go forward, and thus that the formal proof is evidence even when put in issue."

In *Dickinson vs. Riley*, 85 F. (2d) 385, the Circuit Court of Appeals said:

"Since 'the proof of claim is prima facie evidence of the validity of the claim' * * * a verified claim when filed, puts the burden on the trustee to overcome by some substantial evidence, the prima facie case thus made."

In *Durrance vs. Collier*, 81 F. (2d) 4, the Circuit Court of Appeals again stated:

"Bankruptcy proceedings are more summary than ordinary suits, and a sworn proof of claim against a bankrupt is prima facie evidence of the allegations in case it is objected to."

In re Hannevig, 10 F. (2d) 941, the Circuit Court of Appeals stated:

“The proof of claim submitted by the liquidator of the bank and sworn to by him, states that the bankrupt ‘still is justly and truly indebted to the said bank in the sum of \$320,364.80.’ This in itself is prima facie proof, and no further proof needs to be produced unless evidence contradicting it is produced by the objector * * * We must therefore examine the record to ascertain what proof it contains which contradicts and overcomes the prima facie case made out by the proof of claim.”

In the case of *Moore vs. Crandall*, 205 F. Rep. 689; CCA (9), the Court said:

“It is well settled that in bankruptcy proceedings, a sworn proof of claim is prima facie evidence of its allegations as against the objections of the trustee; that is to say, Mrs. Crandall’s formal proof is some evidence of the alleged fact that she acted as a clerk in her husband’s store, that she was to be paid wages at \$20.00 per week, that it was specifically agreed upon between her and her husband that she was to receive her wages for her own and separate use, and that such agreement was made with her at the opening of the bankrupt’s business. Her case was therefore made prima facie and she could await the introduction of evidence, if any, could be produced tending to overcome that she had presented.”

We contend that the effect of the sworn proof of claim filed by the administrator of the estate of Judge

J. P. Kavanaugh, deceased, is to require an objector to go forth and to impeach its validity. The record in this case is devoid of any evidence which tends to impune the validity of the Kavanaugh claim. Indeed counsel for the objectors concede that the services upon which the claim was based were rendered by Judge Kavanaugh over a period of years. No attempt was made to impeach the reasonableness of the amount. Under these circumstances the Referee was justified to permit the Kavanaugh claim to vote in the amount it was sworn to be due and owing.

It is further contended that the referee erred and likewise the District Court of the United States for the District of Oregon, in permitting several of the claims in Group B to vote for a trustee over the objection of the appellants because the said claims were executed subsequent to the jury's verdict of insolvency, but prior to the entry of the formal order of adjudication. No authority is cited in support of that proposition and we contend that the position is entirely fallacious. The condition of a bankrupt estate whether it relates to property or to the status of creditors is generally held to be as of the time the petition was filed and the date of the adjudication relates to the time of the filing of the petition.

The principle may be gathered from the decisions

involving title to property where it is held that the property which vests in the trustee at the time of adjudication is that which the bankrupt owned at the time of the filing of the petition.

In *Everett vs. Judson*, 228 U. S. 474, the Supreme Court said:

“We think that the purpose of the law was to fix the line of cleavage with reference to the condition of the bankrupt estate as of the time at which the petition was filed, and that the property which vests in the trustee at the time of adjudication is that which the bankrupt owned at the time of the filing of the petition. * * * We think it clear that the time of the filing of the petition in this case should be taken as the date of cleavage determining the property passing to the trustee, and through him to the creditors.”

Even if these claims have some informal defect, we submit that such would not justify the referee in disallowing them for the purposes of voting. To take such a position would be to accept form instead of substance, and the generally accepted principle is that the practice regarding proof of claims is to be liberal and free from technicalities. *In re Goldstein*, 199 F. 665, the petitioner for review contended that the referee should have disallowed the proof altogether, but that instead of doing so, he amended it on his own motion and reduced it to the amount of \$1700.00, and that the referee erred in allowing

it for \$1700.00 without requiring the proof to be resworn.

The District Court in upholding the referee said:

“If this contention is sound a proof of claim must be regarded as an entirety which the court must either accept in full or reject altogether. I find nothing in the act which requires me to so regard it. * * * There are express provisions in Section 57 (k and l) for the re-allowance or rejection in whole or in part of a claim reconsidered after allowance, but it is not only upon reconsideration that objections to a claim either by parties in interest or by the court of its own motion may be dealt with. Clauses (d and f) of Section 57 provide for the hearing and the determination of such objections before allowance, and I am unable to believe it a necessary result of clauses (k and l) that the original allowance of a claim can only be for the full amount and may not be for a part of that amount. To say that this is what the act requires and that a claim of which a part, but not the whole, is sustained by the proof must be amended and resworn before it can be allowed at all, would be in my opinion a departure unwarranted by anything in the act from the recognized principle that the practice regarding proof of claims is to be liberal and free from technicalities.”

Similarly in the instant case, as far as the objection to the claims voted by Group B which were executed subsequent to the jury's verdict, a liberal construction should be applied, rather than the restrictive and the technical.

It is to be noted that no question has been raised

as to the capacity and qualification of the appointee to act as trustee of this estate.

CONCLUSION

In conclusion, we respectfully submit that no error can be found in the ruling of the referee and the decision of the district court in affirming said ruling by holding that the Kavanaugh claim and the other claims were properly voted under the circumstances disclosed by the record, and that the determination by the referee that no election resulted and therefore required the appointment of a trustee was proper and the order of the court appealed from should be affirmed.

Respectfully submitted,

SAMUEL B. WEINSTEIN,

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Attorneys for Appellee.

In the United States
Circuit Court of Appeals
For the Ninth Circuit

In the Matter of WEST HILLS MEMORIAL PARK, a corporation, Bankrupt, WM. H. B. SMITH, JR., H. J. SANDBERG, HOWARD-COOPER CORPORATION, SHELL OIL COMPANY, JAMES A. SEWELL, DRAKE LUMBER COMPANY, C. H. MARTIN, GEORGE TEUFEL, HOWARD E. GOLDEN, P. E. GOLDEN, L. L. DOUGAN, WARREN H. COOLEY, OREGON SECURITIES COMPANY, CUTLER PRINTING COMPANY and OREGON SIGN & NEON CORPORATION,
Appellants,

vs.

CLARENCE X. BOLLENBACH, Trustee of the Estate of West Hills Memorial Park, a corporation, Bankrupt,
Appellee.

APPELLANTS' REPLY BRIEF

Upon Appeal from the District Court of the United States for the District of Oregon.

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APPELLANTS' REPLY BRIEF

Upon Appeal from the District Court of the United States for the District of Oregon.

We shall first analyze the points and authorities cited by appellee.

**POINT A ON PAGE 5 OF APPELLEE'S BRIEF
STATES THAT**

Claims for legal services rendered to the bankrupt, if otherwise valid, are provable and allowable in bankruptcy. Two cases and a citation from Remington are cited as authorities. With that point we have no quarrel. Neither the textbook citation nor the cases state or infer that claims of attorneys for services rendered the bankrupt may be voted in the selection of a trustee. The case of *Beale vs. Snead*, cited on page 7 of appellants' brief, is direct authority for the proposition that a claim for services rendered the bankrupt as attorney should be excluded from voting in the election of the trustee. That case was decided in 1936 by the Circuit Court of Appeals for the 4th Circuit and was affirmed by the Supreme Court. The Circuit Court of Appeals said on page 970 in 81 Fed. (2d) as follows:

“As Mr. Catterall's claim was for services rendered the bankrupt as attorney, it was properly excluded from voting in the election of the trustee.”

Based upon the law so clearly stated the referee should not have permitted the Kavanaugh claim to be voted. However, appellants made the further objection to the claim that the consideration should have been set forth in detail in the proof of claim and for want thereof the proof was insufficient for any purpose. That leads to a discussion of appellee's authorities.

POINT B ON PAGE 5 OF HIS BRIEF

That point is that a proof of claim duly verified asserting a claim valid on its face is *prima facie* evidence of its provability and allowability. It is true that a proof of claim, complete on its face and duly verified is *prima facie* evidence of the facts set forth therein. The rule is stated as follows in

6 Am. Jur. 567:

“Care and particularity are required in the preparation of a proof of claim, for it is both the creditor’s pleading and his evidence and makes for him a *prima facie* case.”

This is the rule as laid down in Remington, Collier and numerous authorities cited on page 7 of appellants’ brief. We reassert that to be the rule. But none of the citations of appellee under that point (page 5 of appellee’s brief) state that where the proof of claim fails to state the facts required as evidence, it could still make a *prima facie* case. It is because the proof of claim serves the purpose of a deposition and has probative effect that a general statement of the consideration is insufficient to permit the claim to be allowed. Only when the proof of claim does contain the necessary and required statement of facts can it serve as evidence. Then and then only does it make a *prima facie* case and no authorities have been cited by appellees holding otherwise.

In all of the cases cited by appellee under Point B the proofs of claim were sufficient. Even the last of those cases did state to a reasonable extent what

the consideration and basis were for the claim. That is *In re Hannevig*, 10 Fed. (2d) 941, from which we quote as follows:

Quoting from page 941:

"The claim involved is in the sum of \$320,364.80, which is alleged to be due from the bankrupt on unpaid subscriptions on account of the purchase of shares of stock in Hannevig's Bank, Limited, afterwards known as British-American & Continental Bank, Limited. The claim is filed by the official liquidator of the bank, which is in liquidation. It is alleged that the bank allotted to the bankrupt 20,000 shares of 5 pounds each, and that \$320,364.80 is due thereon."

UNDER POINT C ON PAGE 6

Appellee in his brief makes a point that where a claimant is present at the meeting to elect a trustee and prepared to support the claim it is not error for the referee to allow it for voting purposes. Three cases are cited to support this point. The first is the case of *In re Louis Elting, Inc.*, 4 F. Sup. 732.

In that case the proof of claim did not contain a detailed statement of the merchandise sold and delivered by the creditor. The District Court for the Southern District of New York held as follows:

"In proceedings for election of a trustee in bankruptcy, proof of claim, although not setting forth character of merchandise sold and delivered, was sufficient where the creditor *was present and supplied necessary information and tendered himself for further cross-examination if desired.*"

This is different than the stated point, i. e., that a claimant need but be present and prepared to support the claim. We shall come back to that case again later.

The second case cited under Point C is *Baumbauer vs. Austin*, 186 F. 260. Perusal of that case will disclose that the proof of claim contained a detailed statement of the basis of the claim. It was sufficient for the claimant to present it and rest. This made a *prima facie* case and there was insufficient opposing testimony to overcome that case. There is nothing in that decision to modify the rule that the proof of claim must set forth the consideration to be allowable.

The third case cited under Point C is *Steinmetz vs. Grennon*, 106 Ore. 625, 212 Pac. 532. This was an action by one partner against another wherein the parties had sold a partnership business and, after going over their accounts, agreed upon the balance due from one to the other. The court says also that where the parties agree on the balance, the law will imply a promise to pay. This case has no application to the instant situation as will be shown later herein in greater detail.

UNDER POINT D ON PAGE 6

Two cases are cited. These cases hold that great weight will be given findings of fact of a referee. We do not quarrel with the holding in those cases.

But here the referee did not have a hearing or make any findings. He merely held as a matter of law that the proof of claim was sufficient. We shall go into this also in greater detail shortly.

UNDER POINT E ON PAGE 7

are two citations, one in Remington and the other a U. S. Supreme Court case. These hold that the title to property in the bankruptcy estate is set as of the date of the filing of the petition. This is good policy and we concur in that. It does not control as to proofs of claim and we confess that there are no authorities either way on the effect of executing a proof of claim and power of attorney before adjudication. The question therefore is purely one of policy. We feel that no good purpose can be served by allowing such claims until amended. Ultimately, for dividend purposes the claimant can either file a new proof or amend and thereby participate. No hardship will therefore result from adopting the policy for which we contend.

On the other hand, in involuntary cases considerable time often elapses between the filing of the petition and ultimate adjudication. If proofs of claim can be properly executed before adjudication ready opportunity is afforded someone to obtain claims in the interest of the bankrupt while the petitioning creditors are engaged in obtaining the involuntary adjudication. It can be said that if such

is the fact the claims will be denied the right to vote anyhow. It is important to prevent wrongful acts by adopting proper policy, and such procedure is better than saying "We'll catch the culprit anyhow." Too often the direct connection with the bankrupt is difficult or impossible to prove. Why give the bankrupt such opportunity, especially when he deems that the adjudication is probable? The bankrupt knows who and where his creditors are long before the petitioning creditors learn of them. He can build his fences while the petitioning creditors are laboring to prove the grounds for involuntary adjudication. It should not be overlooked that the officers and attorneys for the bankrupt voted or attempted to vote for the same candidate who was nominated by the creditors whose proofs were executed prior to adjudication. Nor is there merit to the statement that at the time those proofs were executed all that needed to be done was enter the formal order of adjudication. There was then pending a motion to dismiss the petition notwithstanding the adjudication. Moreover, the verdict of the jury covered merely the question of insolvency and commission of the act of bankruptcy. All other issues were for the Court to decide. (See Section 19(a) of the Bankruptcy Act.) To the writer of this brief presentation of the issue on the respective motions to dismiss or to adjudicate were serious matters and not mere formalities.

ARGUMENT

Now let us meet the argument set forth in appellee's brief. Let us return to the Kavanaugh claim.

Appellants objected to the claim and the objection was overruled. The referee had two choices before him when that objection was made. He had either to postpone the meeting and election for a future date until a hearing could be had upon the claim or he had to conduct a hearing then and there and upon that hearing make a determination of the claim. In this instance the referee did neither. He *did not* postpone the meeting, he *did not* conduct a summary hearing and take evidence upon the claim. Appellants' Petition to Review states what occurred. See Transcript of Record, page 11, paragraph XII and first part of paragraph XIII, which says as follows:

"XII.

"That petitioners objected to the voting of the claim presented by R. N. Kavanaugh, among other reasons, on the ground that said claim was not properly itemized and that the consideration therefor was not sufficiently set forth."

"XIII.

"That said objection was overruled"

That this is what occurred is confirmed by the referee when he stated in his certificate (see page 2 of Transcript of Record) as follows:

"The facts stated in the petition for review are substantially correct, except in the following particulars:"

Then follow five exceptions, none of which denies the statements in paragraphs XII and XIII of the Petition to Review just quoted. The referee *did not* conduct a summary hearing or take evidence upon the claim and he *did not* say he did. The referee did set forth the following in his statement of the Questions Presented. Commencing at the last paragraph on page 5 of Transcript of Record:

“(3) Was the referee in error in permitting R. N. Kavanaugh, Administrator of the Estate of J. P. Kavanaugh, deceased, to vote the claim of the estate in the sum of \$2500.00 over the objection of the petitioners that it was not properly itemized and the consideration therefor not sufficiently set forth?”

“With respect to the objections to the Kavanaugh claim, Mr. Lenske admitted that he knew that Judge Kavanaugh had rendered valuable services to the bankrupt some years ago but that he was of the opinion that the amount asked was too large. Mr. Kavanaugh stated that statements had been rendered to the bankrupt for this amount over a period of years and that it had not been questioned by the bankrupt. *The referee ruled that he would give full faith and credit to the sworn statement contained in the claim and that Mr. Kavanaugh was entitled to vote the claim.*”

R. N. Kavanaugh, administrator of the estate of the estate of J. P. Kavanaugh, *did not* offer to supply the want of testimony in the proof of claim and *did not* tender himself for examination thereon as was done in the Louis Elting case, *supra*, and the referee *did not* say or find that R. N. Kavanaugh so did.

Appellee states on the bottom of page 10 of his brief:

“Moreover, claimant, R. N. Kavanaugh, as administrator, was present, was subject to examination and cross-examination and under these circumstances it has been held, *In re Louis Elting, Inc.*, 4 Fed. Sup. 732, that it would remove the objection that the claim was not itemized.”

Appellee does not say that R. N. Kavanaugh was examined or cross-examined or that he supplied the necessary information and tendered himself for examination. Yet the *Louis Elting* case, the sole exception to the vast array of direct authority cited in appellants' brief excuses the detailed statement of the consideration only

“where the creditor was present and supplied the necessary information and tendered himself for further cross-examination if desired.”

What did R. N. Kavanaugh do or say? He merely gave an excuse for the failure to make the necessary proof. How can stating that bankrupt had not objected to statements sent to bankrupt satisfy the want of proof required by the Bankruptcy Act and the Supreme Court decisions?

The very holding in the *Louis Elting* case, *supra*, is a departure by the District Court for the Southern District of New York from the requirement of detailed statement of the consideration by the Supreme Court decisions. It should not be followed. But if it is followed this Court should not further relax the

law by holding that if an excuse for not giving the information is tendered orally instead of the information itself, then also the requirement of the Bankruptcy Act will be forgotten or overlooked.

Appellee draws the inference from the bare statement of R. N. Kavanaugh that statements had been rendered to the bankrupt for \$2500.00 over a period of years and that it had not been questioned, constituted an account stated. In the first place it is not true that such statements had been rendered to bankrupt for a period of years and had not been questioned. The statement itself says the claim is for legal services rendered between May 1, 1935 and October 1, 1938. The bankrupt was in receivership before such period of time could elapse. But that is beside the point. Permit us to continue in the following manner:

1. Was the proof of claim itself based upon an account stated?

No, see page 14 of Transcript of Record.

2. Did R. N. Kavanaugh orally or otherwise change the proof of claim from one for an account for services rendered to one on an account stated?

No.

3. Did the referee find at the time and rule that there was an account stated or that the claim was changed to one on an account stated?

No.

Only if the above questions could be answered in the affirmative would the legal question arise as to whether a claim on an account stated need not state the consideration. Not one such authority has been cited by appellee; whereas, amongst the authorities cited by appellants even a claim based upon a note, which in and of itself imports a valid consideration, must nevertheless set forth the consideration to effect sufficient proof. See authorities on page 7 of appellants' brief. But let us see what logic there is to such contention.

The purpose of Sec. 57 (a) of the Bankruptcy Act and Supreme Court General Order XXI, as stated by the Court in the Matter of Creasinger, 17 A.B.R. 538, is "to enable the trustee or creditors to pursue any proper and legitimate inquiry as to the fairness and legality of that claim."

If the claim is filed as an ordinary account without specifying the consideration by itemizing the account, is the purpose of the act and order fulfilled by the claimant shifting to the contention at the crucial moment that the claim is based upon an account stated because the claimant did not object to the statements rendered? Does that aid creditors in ascertaining whether the claim is legitimate, either in whole or in part? Does it aid a referee in determining the validity of the claim without further inquiry and investigation? On the contrary, it merely attempts to avoid the direction of the statute, the order and the Supreme Court rulings. It in effect

says that when it's called tweedledee claimant must give forth reasonable testimony and information to persons entitled to it in writing and under oath and where it can be readily seen but if you really insist on the information, well, my name is tweedledum and I don't have to tell you.

May we quote a bit more from *In the Matter of Creasinger*, *supra* :

"The claims are so meagre and general in their character that they must clearly be held insufficient. It is not even apparent therefrom whether the claim is upon an express contract for a specific amount of money which was agreed upon to be paid by the bankrupt to Messrs. Shinn for their services, or whether it is upon an implied contract for the reasonable value of such services."

We now come to the question of what effect shall be given to the statement of counsel for some of the objecting creditors that "he knew that Judge Kavanaugh had rendered valuable services to the bankrupt some years ago but that he was of the opinion that the amount was too large." It will be noted from the original proofs of claim on file with the clerk that said counsel was not attorney in fact for all of the claimants who voted for Herbert M. Cole; that all of the creditors who voted for him did object to the Kavanaugh claim. See paragraph XII of page 11 of Transcript of Record. The right to object to a claim is a substantial right and each creditor has that right.

Vol. 2 Remington (4th Ed.) page 609.

“The right of each creditor to have improper claims excluded from allowance and therefore from voting is a substantial right.”

Surely the creditors not represented by the writer were not affected in their rights by the statement that the referee attributes to him. In any event such statement would not supply the want of sufficient evidence in the proof of claim. The sufficiency of an itemized statement has a direct bearing on the amount of the claim. And it was the duty of the referee to deny the claim regardless of who “knew that Judge Kavanaugh had rendered valuable services to the bankrupt.”

Vol. 2 Remington, 4th Ed. page 536.

“A claim may not be allowed ‘provisionally’ to enable a creditor to participate in creditors’ meetings, but must either be allowed or disallowed absolutely.”

Vol. 2 Remington, 4th Ed., Sec. 1007, page 539.

“If the claim is not ‘duly proved’, that is to say, if the affidavit for proof of debt be not correct in form, . . . the referee should not ‘allow’ the claim.”

“And the referee should not allow it even though no party in interest objects.”

In re Goble Boat Co., 190 Fed. 92, 27 A.B.R. 48.

“A referee is not justified in allowing a claim against an estate in bankruptcy when the proofs do not comply with the statute or general orders promulgated by the Supreme Court,

whether creditors or the trustee raise specific objections to the sufficiency of the proof filed or not."

At the bottom of page 9 of appellee's brief we find the statement that the referee heard the objection to the Kavanaugh claim in a summary manner. Appellee makes this statement in error. Neither he nor his counsel were there. They cannot speak from personal knowledge. What about the record on that point?

1. Did the referee say or find that he conducted a summary hearing?

No.

2. Did the referee find for the claimant on the merits?

No.

3. What did the referee do in that respect?

He merely overruled the objections made by appellants and did not postpone the meeting to hear the claim on its merits and he wrongfully ruled that the claim was sufficient on its face when he said: (page 6 of Transcript of record)

"The referee ruled that he would give full faith and credit to the sworn statement contained in the claim. . . ."

All proceedings in bankruptcy before a referee are in their nature summary and a hearing on a claim is a summary hearing. Ruling on the sufficiency of the proof of claim and thereupon promptly

allowing it is not conducting a summary hearing. The rule is stated in

Vol. 1 Remington, 4th Ed., page 61, Sec. 27.

“While proceedings in bankruptcy may be summary they should not be so summary as to deprive a party of those fundamental rights and privileges that belong to every citizen, among which are the rights to be advised of the demand made upon him and, after being so advised to have a reasonable time to prepare his defense and produce his witnesses.”

Vol. 1 Remington, 4th Ed., page 60, Sec. 27.

“The bankrupt act contemplates the proceedings in bankruptcy shall progress with all reasonable dispatch *compatible with the due and orderly administration of justice and a proper regard for the fundamental rights of the citizen.*”

See also Lockman v. Lang, 132 Fed. 1, 12 A. B.R. 497.

This matter is not one of formality or informality, it is one of substance.

In the District Court's opinion we find this statement (page 19 of Transcript of Record) :

“Furthermore, the record on the trial of the insolvency petition will show that the petitioners introduced testimony as to the validity and amount of this claim in order to show insolvency. This fact does not create an estoppel, because the trustee is bound to scrutinize the claim until final liquidation if he discover facts which show improper allowance, but the Referee could consider such facts to determine whether the amount of the claim was proper for allowances.”

1. Did the referee consider it?

No.

2. Did the referee say that he considered it?

No.

3. Did the District Judge say that the referee considered it?

No, he merely stated that the referee *could* consider it.

The fact is that no finding or conclusion was reached by the jury on the validity or amount of the claim. The verdict was a general verdict on the interrogatories submitted and it did not depend upon the Kavanaugh claim. But here is an interesting sidelight.

If consideration should be given to the fact that R. N. Kavanaugh had testified as to the Kavanaugh claim and the referee had known about and considered that fact, what should have been his reaction? He should have held that one who had testified in behalf of a claim should certainly set forth the details showing the consideration in the proof of claim and if not, he should have offered himself for examination and tendered the missing information instead of giving an excuse for not tendering the evidentiary information.

REMINDERS

1. The referee should not appoint a trustee unless the creditors actually fail to elect one.

In the Matter of Universal Seal Cap Company, 47 A.B.R. (N.S.) 106, D.C. E.D. of N.Y. 1941.

2. Under the authority of *Beale v. Snead*, supra, uncontradicted by any authority cited by appellee, the claim of an attorney for services rendered the bankrupt may not be voted for a trustee.

3. In colloquial language we can, after stating above reminders 1 and 2, say "period", but in an abundance of caution we add the following:

4. Where authorities are lacking, good policy should control and such policy should not include claims obtained before adjudication.

5. What counsel for some but not all of the objecting creditors "knew" does not affect the rights of the others.

6. What the referee *could* have considered but didn't should be ignored.

7. Several excellent authorities were cited by appellants directly on the point that proofs of claims for attorney fees *must* be itemized to be allowed and not one was cited to the contrary on such direct point.

8. Even if there were no objections to the claims that were insufficient on their face, the referee should not have allowed them.

9. The referee should in no event allow claims "for voting purposes" that should not be allowed for all purposes.

10. If the requirement of itemization of claims for legal services was carried out and as a result the Kavanaugh claim was filed for \$2413.57 in lieu of the lumped \$2500.00 and the claims were otherwise votable, appellants would have controlled the election by a clear majority in both number and amount.

11. This appeal is not from findings of a referee but a clear error of law gleaned from his own Certificate and the proofs of claim that accompanied it.

12. Any of the errors committed by the referee were sufficient to give appellants a clear majority in number and amount and the right of election.

Respectfully submitted,

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